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No. 17034

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

R. MILO GILBERT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.
JURISDICTIONAL STATEMENT.

On August 5, 1959, the Grand Jury for the Southern District of California indicted appellant in thirty-five counts.

In essence counts one through eleven charge appellant with wilfully and knowingly aiding and assisting in the preparation of false and fraudulent income tax returns. Counts twelve through fourteen and counts twenty-one and twenty-two charge appellant with wilfully and knowingly forging United States Treasury checks. Counts fifteen, sixteen and seventeen charge appellant with knowingly and wilfully presenting a forged United States Treasury check to an office of the United States. Counts

eighteen, nineteen and twenty charge appellant with knowingly and wilfully making a material false representation to an agency of the United States. Counts twenty-three through thirty-five charge appellant with wilfully and knowingly aiding and assisting in the preparation of false and fraudulent income tax returns. [C. T. 25-59.][1]

Upon arraignment [R. T. 2][2] and a plea of not guilty to all counts [R. T. 72-75], appellant was tried by jury and convicted on counts four through thirty-four and acquitted on counts one, two, three and thirty-five. [R. T. 1114-1116.] On January 22, 1960, sentence was imposed by the court, under which appellant was committed to the custody of the Attorney General for a period of one year and one day for each of counts four through thirty-four, the sentence to run consecutively for a period of thirty-one years and thirty-one days and a fine of $5,000. [R. T. 1157-1163.]

Jurisdiction of the District Court is predicated upon Title 18, United States Code, Sections 495 and 1001 and Title 26 United States Code, Section 7206(2) and Title 18, United States Code, Section 3231. The jurisdiction of this court rests pursuant to Title 28 United States Code Sections 1291 and 1294.

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[1]C. T. refers to Clerk's Transcript of Record.

[2]R. T. refers to Reporter's Transcript of Proceedings.

II.
STATUTES INVOLVED.

Section 7206(2) Internal Revenue Code of 1954 provides in pertinent part as follows:

"SEC. 7206—FRAUD AND FALSE STATEMENTS.

"Any person who . . .

"(1) . . .

"(2) AID OR ASSISTANCE. Wilfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the Internal Revenue Laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; . . . shall be guilty of a felony and upon conviction thereof, shall be fined not more than $5,000 or imprisoned not more than three years, or both, together with the cost of prosecution."

Title 18, United States Code, Section 495 provides in part as follows:

"Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or

"Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the

same to be false, altered, forged, or counterfeited; or

"Whoever transmits to, or presents at any office or officer of the United States, any such writing in support, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited . . . shall be fined not more than $1,000 or imprisoned not more than ten years, or both."

Title 18, United States Code, Section 1001 states in pertinent part as follows:

"Whoever, in any manner within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

III.
STATEMENT OF THE CASE.

Appellant was indicted on August 5, 1959, [C. T. 25], arraigned [R. T. 2], and pleaded not guilty. [R. T. 72-75.]

A motion to suppress was filed by appellant on August 21, 1959 [C. T. 74] and an opposition filed thereto on September 18, 1959. [C. T. 81.] A reply affidavit was filed by appellant on September 24, 1959. [C. T. 88.] After argument on the motion to suppress [R. T. 33-71], the Court granted the motion to suppress except as to the files relating to counts twelve,

thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, twenty-one, and twenty-two [C. T. 66-67] and entered an order pursuant to this ruling, wherein appellee could only retain the files concerning James and Manon Manion, N. and T. Libling, Dolores J. Frankel, Fay Matorian, Daniel H. and Charline R. Bartfield. [C. T. 96-97.]

Appellant having been found guilty [R. T. 1114-1116], sentence was imposed on January 22, 1960. [R. T. 1157-1163.]

Appellant specified the following points on appeal:

1. The Government's case is based on illegally obtained evidence.

A. The search and seizure were illegal and in violation of the fourth Amendment.

B. The counts charged [1 through 20 and 23 through 35] as a result of the illegal search and seizure; and the counts thereof upon which defendant was convicted as a result thereof [4 through 20 and 23 through 34] should have been dismissed and defendant's motion for acquittal and a new trial should have been granted.

2. The Manion Exhibits (19 and 22) were improperly admitted into evidence.

3. When one does not purport to be duplicating the signature of a payee, and endorses the check "as trustee", the crime of forgery has not been committed.

4. It was error to admit evidence concerning the tax returns in connection with the forgery and false and fraudulent statements re endorsement of checks counts.

5. The evidence was insufficient to sustain the verdict as to counts 21 and 22.

IV.
STATEMENT OF FACTS.

On January 2, 1959, pursuant to a warrant of arrest for a violation of Title 18, United States Code, Section 495 [C. T. 239-240] Agent James H. Hirst, United States Secret Service, Treasury Department, went to the home of appellant at 2747 North Lincoln Street, Burbank, California, accompanied by Agent William Coyne. [C. T. 81.]

Upon arrival at appellant's residence, Agent Hirst displayed his credentials, handed appellant a copy of the warrant, and placed appellant under arrest. [C. T. 82, 88.]

Incident to this arrest, appellant, who for a number of years had been in the business of preparing tax returns for clients [C. T. 89], was requested by the agents to show his tax records, files, and papers. [R. T. 82, 86.] These files were perused by the above agents, aided by agents Fritz T. A. Borchardt and Milton Lewis, Intelligence Division, Treasury Department. Furthermore, invitation to inspect these records was made by appellant during this perusal. [R. T. 82, 86.] All the records examined were taken into custody by Agent Hirst. [C. T. 82.]

On hearing the motion to suppress, the Honorable Leon Yankwich stated:

> ". . . I will grant the motion to suppress as to all the files except those relating to the four checks as set forth in Counts twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, twenty-one, and twenty-two. The motion will be denied as to such files as relate to those offenses because they bear upon the instrumentality of the forgery." [R. T. 66-67.]

Count Twelve concerns a forged check of James J. Manion. [C. T. 36.] Count Thirteen concerns a forged check of Manon Manion. [C. T. 37.] Count Fourteen deals with a forged check of Manon Manion. [C. T. 38.] Count Fifteen deals with a forged check of James J. Manion. [C. T. 39.] Count Sixteen concerns the forged check of N. & T. Libling. [C. T. 40.] Count Seventeen relates to the forged check of Dolores J. Frankel [C. T. 41.] Count Eighteen relates to the forged check of Fay Matorian. [C. T. 42.] Count Twenty-one concerns a forged check of Daniel H. and Charline R. Bartfield. [C. T. 45.] Count Twenty-two relates to a forged check of Daniel H. and Charline R. Bartfield. [C. T. 46.]

The court requested that appellant make the order for suppression of evidence [R. T. 76-77] which was in fact accomplished by appellant and set forth as follows:

"...

"Defendant's Motion For the Return of Seized Property and the Suppression of Evidence was granted and all of the property seized from defendant was ordered returned to defendant and the said property was ordered suppressed as evidence against defendant, except in the following particulars, wherein the Motion was denied:

1. File in relation to James Manion and Manon Manion.
2. File in relation to N. & T. Libling.
3. File in relation to Dolores J. Frankel.
4. File in relation to Fay Matorian.
5. File in relation to Daniel H. and Charlene R. Bartfield . . ." [C. T. 96-97.]

V.
ARGUMENT.

A. Appellee's Case Is Not Based Upon Illegally Obtained Evidence.

1. The Search and Seizure Was Lawful.

The trial court ordered the suppression of evidence to all materials taken by the arresting officers, except to those files relating to James Manion and Manon Manion, N. and T. Libling, Dolores J. Frankel, Fay Matorian and Daniel H. and Charline R. Bartfield [R. T. 66-67, C. T. 96-97.] It will, therefore, be necessary to determine whether the latter files were legally seized. Prior to broaching the problem of the legality of the search and seizure, it must be ascertained whether a valid arrest was effected.

It was stated in *Harris v. United States,* 331 U. S. 145 (1947), at page 150:

> "The Fourth Amendment has never been held to require that every valid search and seizure be effected under the authority of a search warrant. Search and seizure incident to lawful arrest is a practice of ancient origin . . ."

In the case at bar, a complaint was filed alleging that appellant had violated the provisions of Title 18, United States Code, Section 495, namely, forging of a United States Treasury check. [C. T. 239.] Pursuant to this complaint, a warrant of arrest issued for the arrest of appellant [C. T. 240.] With this warrant in hand, Agent James Hirst went to the home of appellant, and, after properly identifying himself, placed appellant under arrest. [C. T. 82, 88.]

Appellant urges, but apparently without vigor, that the warrant of arrest was invalid (Appellant's Br. p. 36.)

It should be noted that at the motion to suppress appellant approached the issue from a radically different vein, stating:

> "Mr. Dorn: I make no point, if the court please, at this time as to the fact they arranged to arrest him at his home. I only stated that they had a right to do that and no point is made of that at all.
>
> ". . . He came to the home with that warrant and made a lawful arrest. I do not deny that the arrest was anything but lawful." [R. T. 38-39.]

The contention of appellant seems to be that the arrest was improper because the return of the warrant of arrest was made [C. T. 240] was made three days after the arrest (Appellant's Br. p. 36a.)

However, a return of a warrant is a ministerial act and any failure therein does not void the warrant.

> *Evans v. United States,* 242 F. 2d 534, 536 (6th Cir. 1957), *cert. den.* 353 U. S. 976 (1957).

It is thus apparent that merely because the return on the arrest warrant states January 5, 1959 [C. T. 240] it would in no way invalidate the warrant or arrest, which all parties agree was executed on January 2, 1959. [C. T. 82, 86, 88.]

Nevertheless, were we to assume that the warrant of arrest was invalid, there was yet a valid arrest.

Where a warrant of arrest is invalid on its face, if there are facts which are sufficient to justify apprehension without a warrant, the arrest is lawful and valid.

Go-Bart Importing Company, et al. v. United States, 282 U. S. 344 (1931);

United States v. Rabinowitz, 339 U. S. 56 (1950).

Agent Hirst, in the instant case, had evidence that appellant had committed the crime of forgery of a United States Treasury check and manifestly had sufficient probable cause to arrest appellant without warrant.

Having concluded there has been a lawful arrest, it is incumbent upon us to decide whether there was a lawful search and seizure incident to that arrest.

As it has been posited in numerous cases, "each case is to be decided on its own facts and circumstances . . ."

Go-Bart Importing Company, et al. v. United States, supra;

Harris v. United States, supra.

Although each case must be decided on its own facts, there are certain guide posts which have been set forth in various cases to aid us in our determination.

The difficulty of reconciling the numerous cases in this area was recognized by the Supreme Court in *Abel v. United States,* 362 U. S. 217, 235 (1960), wherein it stated:

> ". . . The several cases on this subject in this Court cannot be satisfactorily reconciled. This problem has, as is well-known, provoked strong and fluctuating differences of view on the Court. This is not the occasion to attempt to reconcile all the

decisions, or to re-exmaine them. Compare *Marron v. United States,* 275 U. S. 192, with *Go-Bart Co. v. United States,* 282 U. S. 344, and *United States v. Lefkowitz,* 285 U. S. 452; compare *Go-Bart, supra,* and *Lefkowitz, supra,* with *Harris v. United States,* 331 U. S. 145, and *United States v. Rabinowitz,* 339 U. S. 56; compare also *Harris, supra,* with *Trupiano v. United States,* 334 U. S. 699, and *Trupiano* with *Rabinowitz, supra* (overruling *Trupiano*). Of these cases, *Harris* and *Rabinowitz* set by far the most permissible limits upon searches incidental to lawful arrest. In view of their judicial context, the trial judge and the Government justifiably relied upon these cases for guidance at the trial . . ."

Looking then to *Harris v. United States, supra,* page 154, the Court states,

". . . This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime . . ."

Of considerable assistance is *Abel v. United States, supra,* wherein the defendant was arrested on an administrative warrant for deportation. Seven items were discovered pursuant to the search: (1) A piece of graph

paper. (2) A forged birth certificate in the name of "Martin Collins". (3) A forged birth certificate of "Emil Goldfus". (4) A certificate of vaccination issued to "Martin Collins". (5) A bank book in the name of "Emil Goldfus".

(6) A hollowed-out pencil with microfilms.

(7) A block of wood containing a "cipher pad."

Items (1) and (2) were obtained pursuant to a search of the defendant's apartment, incident to the administrative warrant. Items (3), (4), and (5) were found in defendant's belongings, which he had brought with him, at the Immigration and Naturalization Service headquarters where the agents had taken him. Items (6) and (7) were found by a Federal Bureau of Investigation Agent in a search of the hotel room after defendant had abandoned it and the agent had received permission from the hotel manager.

With respect to Item (2), the forged birth certificate with the name "Martin Collins" the Supreme Court stated at pages 237-238:

> "Two of the challenged items were seized during this search of petitioner's property at his hotel room. The first item (2), a forged New York birth certificate for 'Martin Collins', one of the false identities which petitioner assumed in this country in order to keep his presence here undetected. This item was seizable when found during a proper search, not only as a forged official document by which petitioner sought to evade his obligation to register as an alien, but also as a document which petitioner was using as an aide in the commission of espionage, for his undetected presence in this country

> was vital to his work as a spy. Documents used as a means to commit crimes are the proper subjects of search warrants. . . ."

Appellant states "The Government had all the evidence, documentary and oral, which it could possibly need for the charge in the warrant." (Appellant's Br. p. 35.) He apparently is assuming that the tax refund checks and the statements of the true payees that they were signed without authority were all that were necessary. If that were the case, in *Abel* the Immigration and Naturalization Service had all the information it needed to show that the defendant was an alien, and not having reported to the Attorney General every January of his address, was therefore subject to deportation. But yet the Supreme Court held that the forged birth and vaccination certificates were proper articles for seizure incident to the arrest.

Similarly, in the instant case the instrumentalities and means of committing the crime of forgery on these pertinent tax refund checks were found in the files of the taxpayers in the hands of appellant. Information was furnished by the respective taxpayers to appellant in order to make out their tax returns; by James J. Manion, [R. T. 372-373, 378], by Manon Manion [R. T. 444], by N. & T. Libling [R. T. 361, 366], by Dolores J. Frankel [R. T. 463, 464], by Fay Matorian [R. T. 341, 352, 356], Appellant, then, increased the deductions and expenses, thereby falsifying the tax records and returns to increase the amount of the tax refund. Upon the subsequent receipt of the tax refund check, appellant would then forge the names of the payees to get the proceeds. Thus, the method of forgery in the instant case is similar to the use of false identification in

Abel v. United States, whereby Abel was able to stay in the United States and also conduct espionage activities. Certainly the facts bear out the contention that these records and files are instrumentalities of the crime of forgery.

Appellant's statement that the affidavits of the agents is indicative of the fact that they were not seeking the instrumentalities of the forgery but evidence (App. Br. p. 34) is only worthy of consideration because of the problem of semantics. Indeed affidavits which would read that they were looking for "instrumentalities of forgery" would bear close scrutiny. Instrumentalities of forgery, though they may be termed as such, are yet "evidence" which may be used to prove the crime. It was stated in *Abel v. United States,* page 236,

> "Nor is there any constitutional reason to limit the search for materials *proving* the deportability of an alien, when validly arrested, more severely than we limit the search for materials *probative* of crime when a valid criminal arrest is made. . . ." (Emphasis added.)

Now referring to *Rabinowitz v. United States,* 339 U. S. 56, 61 (1950), the Court states:

> "In *Marron v. United States,* 275 U. S. 192, the officers had a warrant to search for liquor, but the warrant did not describe a certain ledger and invoices pertaining to the operation of the business. The latter were seized during the search of the place of business but were not returned on the search warrant as they were not described therein. . . . The search warrant was held not to cover the articles seized, but the arrest for the offense being

committed in the presence of the officers was held to authorize the search for and seizure of the ledger and invoices, this Court saying:

> 'The officers were authorized to arrest for crime being committed in their presence, and they lawfully arrested Birdsall. They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise. . . . The closet in which liquor and the ledger were found was used as a part of the saloon. And, if the ledger was not as essential to the maintenance of the establishment as were bottles, liquors and glasses, it was none the less a part of the outfit or equipment actually used to commit the offense. And, while it was not on Birdsall's person at the time of his arrest, it was in his immediate possession and control. The authority of officers to search and seize the things by which the nuisance was being maintained, extended to all parts of the premises used for the unlawful purpose.' . . ."

It is difficult to distinguish the ledger and invoices used for committing the offense of maintaining a nuisance, and the records and files as a means of committing the crime of forgery in the instant case.

Seizures of an adding machine, a telephone, record books, receipts, pencils, pens, money and the keys to safe deposit boxes were held to be lawful and valid where the arrest was made for a violation of evasion of tax due on wagering activity.

Leahy v. United States, 272 F. 2d 487 (9th Cir. 1959).

Appellee urges that the files of the various individuals who were the payees of the forged Government tax refund checks were instrumentalities and the means of committing the crime of forgery and properly seized as incidental to the arrest of appellant. In fact, although appellee is bound by the ruling of the trial court suppressing some of the evidence, it is our contention that the total seizure was valid.

2. Evidence Used in Appellee's Case Was Properly Obtained.

Appellant next contends that all of the counts in the indictment, except counts twenty-one and twenty-two, were buttressed by illegally obtained evidence (Appellant's Br. pp. 36-37.)

Rule 51, Federal Rules of Criminal Procedure, 18 U. S. C. A. reads in pertinent part as follows:

> "Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefore . . ."

There must be a proper objection to the admissibility of evidence, stating the grounds for such objection.

Onlee v. United States, 343 U. S. 747, 749 (1952);

Bohol v. United States, 227 F. 2d 330, 331 (9th Cir. 1955);

Duncan v. United States, 68 F. 2d 136, 140 (9th Cir. 1933); *cert. den.,* 292 U. S. 646 (1934);

Silkworth v. United States, 10 F. 2d 711, (2nd Cir. 1926) *cert. den.,* 271 U. S. 664 (1926).

In the case at bar, except for Exhibits Nineteen and Twenty-two, Appellant at no time objected to the use of any of the exhibits nor to their introduction into evidence on the basis that they were illegally obtained: *e.g.* Exhibits 1 through 7 [R. T. 201], Exhibits 8 and 9 [R. T. 593-594], Exhibits 10 and 11 [R. T. 597], Exhibits 12 and 13 [R. T. 494-495],[3] therefore, Appellant is not now in any position to object on appeal.

However, were proper objections timely made, the nature of the evidence used by Appellee would show that such evidence was available to the Appellee without resorting to those materials which were in the hands of Appellant.

It was stated in *Benetti v. United States,* 97 F. 2d 263, 267 (9th Cir. 1938).

> "Even if the crime for which Appellant was indicted was revealed by an alleged search and seizure in another case, he would not be immune from persecution and his conviction cannot be set aside if sustained by evidence obtained from independent sources and no evidence illegally seized was used against him. Constitutional provisions forbidding the use of evidence secured in an illegal way are not to be construed to mean that facts thus disclosed are forever inaccessible . . ."

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[3]See Master Index [R. T. V, VI, VII], for further manifestation that objections were not made to the introduction of various exhibits.

Likewise if Appellant would extend his quotation of the United States Supreme Court in *Silverthorne Lumber Company v. United States,* 251 U. S. 385, 392 (1920) (Appellant's Br. p. 37), it would read as follows:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all. *Of course, this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others . . .*" (Emphasis added.)

Accord:

> *United States v. Sheba Bracelets,* 248 F. 2d 134, 141 (2nd Cir. 1957), *cert. den.* 355 U. S. 904 (1957).

In the case at bar, the following exhibits were income tax returns for various individuals:

> Exhibits 1 [R. T. 140], 2 [R. T. 144], 3 [R. T. 145], 4 [R. T. 151], 5 [R. T. 151], 8 [R. T. 217], 9 [R. T. 278], 10 [R. T. 285, 329], 15 [R. T. 357], 17 [R. T. 371], 18 [R. T. 494], 20 [R. T. 371], 21 R. T. 494], 27 [R. T. 463], 28 [R. T. 463], 33 [R. T. 451], 34 [R. T. 451], 35 [R. T. 496], 36 [R. T. 503], 37 [R. T. 496], 38 [R. T. 503], 39 [R. T. 496], 40 [R. T. 503], 41 [R. T. 520], 42 [R. T. 528], 43 [R. T. 520], 44 [R. T. 528], 45 [R. T. 520], 46 [R. T. 528], 67 [R. T. 557].

Furthermore, the following exhibits were tax refund checks which were not only accessible to the Appellee but also were property of the United States Government:

> Exhibits 12 [R. T. 494, 287], 13 [R. T. 494, 340], 16 [R. T. 359], 23 [R. T. 384], 24 [R. T. 384], 25 [R. T. 446], 26 [R. T. 446], 29 [R. T. 466], 30 [R. T. 484], 31 [R. T. 452], 32 [R. T. 452].

The following exhibits were income tax "W-2 forms" for withholding taxes and also available to Appellee:

> Exhibits 47 [R. T. 507], 50 [R. T. 512], 51 [R. T. 512], 57 [R. T. 543], 58 [R. T. 543], 59 [R. T. 543].

Additionally, the following exhibits were records of private concerns and in no way connected with the Appellant:

> Exhibits 48 [R. T. 509], 49 [R. T. 508], 52 [R. T. 512], 53 [R. T. 512], 54 [R. T. 517], 60 through 65 [R. T. 545].

Counts twenty-three through twenty-eight concern Juventino Silva and Celia Sally Silva, [C. T. 47-52] who were not at all mentioned in Appellant's "Schedule of Property." [C. T. 65-68.]

Appellant has offered an explanation (Appellant's Br. p. 40) which can be termed appropriately, as "wild speculation", but without basis in fact or logic. It is obvious that none of the materials taken from Appellant were used in these counts.

The evidence as indicated obviates the basis for appellee continually offering to show to the court that the

evidence which it was using did not come from the search and seizure incident to Appellant's arrest. [R. T. 133, 606, 609.]

It is therefore, urged by Appellee that the evidence used in the trial was based completely on evidence properly obtained.

B. The Manion Exhibits, Nineteen and Twenty-Two, Were Properly Admitted Into Evidence.

Appellant argues that Exhibits Nineteen and Twenty-two should not have been admitted into evidence because illegally obtained. (Appellant's Br. p. 42.)

Trial Courts stated:

> "I will grant the motion to suppress as to all of the files except those relating to the four checks as set forth in Counts twelve, thirteen, fourteen, fifteen, Sixteen, Seventeen, Eighteen, twenty-one and twenty-two. The motion will be denied as to such files as related to those offenses because they bear upon the instrumentality of forgery." [R. T. 66-67] [C. T. 96-97.]

The admissibility of Exhibits Nineteen and Twenty-two which were the records and expenses of James J. and Manon Manion [R. T. 372-373, 378], related to counts twelve, thirteen, fourteen, fifteen all within the prescribed order.

Since there has been an adequate discussion under subtitle A, Appellee's Brief, as to the propriety of the search and seizure as to these files, there seems, to be no apparent reason why these two exhibits could not be admitted.

C. The Crime of Forgery Was Committed.

Appellant argues that the instruction, stating in effect that "one who executes an instrument purporting on its face to be executed by him as agent of a principal named herein, when in fact he had no authority from such principal to execute said instrument is not guilty of forgery", should have been given. (Appellant's Br. p. 45.)

The United States Supreme Court broadly interpreted the statute in question as it stated in *Prussian v. United States,* 282 U. S. 675, 679 (1931).

> "The writings enumerated have no common characteristics from which a purpose may be inferred to restrict the statute to any particular class of writings. The addition of 'other writing' to the enumeration was therefore not for the purpose of including writing of a limited class, but rather of extending the penal provision of the statute to all writings of every class if forged for the purpose of obtaining money from an officer of the United States."

In *Ryno v. United States,* 232 F. 2d 581 (9th Cir. 1956), the defendant was a serviceman, whose wife was receiving a government allotment check in her own name. The defendant had changed the address of the check to "c/o Charles A. Ryno, 479th Maintenance Squadron, George Air Force Base, Victorville, California." Upon receiving the check in the name "Hazel R. Ryno," the defendant signed the check "Hazel R. Ryno", "Charles A. Ryno" and cashed the check. It was held by this Court that the defendant was guilty of forgery and uttering of a forged check, since the husband had no au-

thority to sign the name of the wife. Similarly in the case at bar, Appellant had no authority to sign the name of "N. and T. Libling." [R. T. 359], James J. Manion [R. T. 384], Manon Manion [R. T. 446], Daniel Bartfield [R. T. 453] Charline Bartfield [R. T. 459], Dolores J. Frankel [R. T. 484], Fay Matorian [R. T. 340], Sam Matorian [R. T. 288-89], Allan S. Frankel [R. T. 466-467].

International Finance Corporation v. Peoples Bank, 27 F. 2d 523 (D. C. N. D. W. Va. 1928), aff'd. 30 F. 2d 46 (4th Cir. 1929), *cert. den.,* 279 U. S. 858, is of dubious authority since *Swift v. Tyson,* 16 Pet. 1, 10 L. Ed. 865, cited therein at page 525, has been overruled by *Erie R. Company v. Tompkins,* 304 U. S. 64 (1938). However, the facts there are distinguishable, since the individual in question in that case, Leps, was in fact the Cashier of the bank and had signed only his name "T. D. Leps, Cashier," on a certificate of deposit. The court there held that it was only in excess of authority and not forgery. On the other hand, in the instant case we have the signing of *another's name and no authority* whatsoever, since Appellant was not trustee of N. & T. Libling [R. T. 359], James J. Manion [R. T. 384], Manon Manion [R. T. 446], Daniel Bartfield [R. T. 453], Charline Bartfield [R. T. 459], Dolores J. Frankel [R. T. 484], Fay Matorian [R. T. 340], Sam Matorian [R. T. 289], and Allan S. Frankel [R. T. 467].

If we were to consider that the Appellant had merely assumed authority, it would nevertheless be deemed forgery under the theory posited by *Security National Bank of Durand v. Fidelity and Co. of N. Y.,* 246 F. 2d

582 (7th Cir. 1957), at pages 585-586, wherein it is stated:

> "To constitute forgery there must be a false making, that this might be accomplished by the fraudulent application of a false signature to a true instrument or a real signature to a false instrument; and that the essence of forgery is an intent to injure or defraud at the time the action complained of is done."

There, the signing of one's own name in excess of authority was held to be forgery.

Furthermore, it has been well-settled that the crime of forgery may be committed by the signing of a fictitious or assumed name.

Rowley v. United States, 191 F. 2d 949 (8th Cir. 1951);

Milton v. United States, 110 F. 2d 556 (D. C. Cir. 1940).

Under the circumstances and facts of the present case the defendant signed the payee's name and then signed "by R. Milo Gilbert, trustee." As it can be ascertained from above, the Appellant was not in fact the trustee. Therefore, in reality there is no individual existing entitled "R. Milo Gilbert, trustee." It is thus submitted that it would be a fictitious name and therefore a forgery even in this instance. The Appellee contends that the signing by Appellant of the various payees' names without authority constituted forgery and the trial court was correct in not giving the instruction as requested by Appellant.

D. It Was Not Error to Admit Evidence Concerning the Tax Returns in Connection With the Forgery and False and Fraudulent Statements Re Endorsement of Checks Counts.

In ruling on the admissibility of evidence, a trial judge is accorded large discretion.

Moore v. United States, 150 U. S. 57 (1893).

Appellant urges that "testimony concerning income tax returns, how the address was made out, how much fee was being paid defendant for preparing returns" do not bear on the question of forgery or misrepresentation. (Appellant's Br. p. 49.)

Evidence of similar acts are admissible to show design, purpose, and common scheme.

Nye & Nissen v. United States, 336 U. S. 613, 618 (1949);

United States v. Leviton, 193 F. 2d 848, 852 (9th Cir. 1951);

Enriquez v. United States, 188 F. 2d 313, 316 (9th Cir. 1951);

Todorow v. United States, 173 F. 2d 439, 447 (9th Cir. 1949), *cert. den.,* 337 U. S. 925 (1949);

Tedesco v. United States, 118 F. 2d 737, 740 (9th Cir. 1941).

It is true that the forgery and misrepresentation concern the income tax refund checks, but the *modus operandi* of committing these crimes is found in the evidence which was admitted. The income tax returns were filed with false deductions and expenses [*e.g.* R. T. 374, 376, 377, 342], for which income tax refund checks

would be sent to the payees. However, in this case the checks were sent in care of the Appellant without the knowledge of the payees [*e.g.* R. T. 383, 451, 465], whereupon the appellant would then forge the names of the payees and cash the checks for his own benefit.

Not only is the evidence relevant and material, but manifested the plan and design of appellant in committing the crimes and the trial court certainly did not commit error in admitting this evidence.

E. There Was Sufficient Evidence to Sustain Verdicts as to Counts Twenty-One and Twenty-Two.

Initially, appellant is confronted with the well-settled proposition that the appellate court will not substitute its judgment for that of the trial court in findings of disputed facts. Also, the appellate court will consider evidence and all inferences which can reasonably be drawn from the aspect most favorable to support these findings.

Glasser v. United States, 315 U. S. 60, 80 (1941);

Sandez v. United States, 239 F. 2d 239 (9th Cir. 1956);

Arena v. United States, 226 F. 2d 227, 229 (9th Cir. 1955), *cert. den.,* 350 U. S. 954 (1946).

The trial court instructed the jury as to this particular issue thusly:

"Where a tax accountant represents a taxpayer in the preparation of tax returns, there is no pre-

sumption of authority and the rights of the tax accountant must be governed by the terms of his employment, as applies to any other ordinary agency.

"Also, a power of attorney to prosecute a claim against the Government giving authority to receive a check in payment gives the agent no power to endorse and collect the check. But such authority may be given either orally or in writing." [R. T. 1099.]

The credibility of witnesses and the weight to be given their testimony are to be determined by the trier of facts.

Stopelli v. United States, 183 F. 2d 391, 394 (9th Cir. 1950);

Norfolk v. McKenzie, 116 F. 2d 632, 635 (6th Cir. 1941).

In the case at bar, although the Bartfields admitted that the signature on the alleged power of attorney was their signatures [R. T. 454-459], yet they further stated that they had not given appellant authority to cash their checks [R. T. 453, 459], nor did they remember signing the document purporting to be the power of attorney. [R. T. 454, 462.] Under the circumstances the jury could very well have believed that appellant did not in fact have the power of attorney or the authority to endorse the names of the various payees. It is apparent there was sufficient evidence to support the verdict on these two counts.

VI.
CONCLUSION.

1. Appellee's case is not based on illegally obtained evidence.

2. Exhibits Nineteen and Twenty-two were properly admitted.

3. The crime of forgery was committed.

4. It was not error to admit evidence concerning the tax returns in connection with the forgery and false and fraudulent statements regarding endorsement of checks counts.

5. There was sufficient evidence to sustain the verdict as to Counts twenty-one and twenty-two.

Respectfully submitted,

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NO. 17035

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, APPELLANT

VS.

KENNETH EUGENE GIBBS AND RONALD CHARLES WACHS,
APPELLEES

UNITED STATES OF AMERICA, PETITIONER

VS.

HONORABLE JAMES M. CARTER, RESPONDENT

REPLY BRIEF

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REPLY BRIEF

The Brief filed by the Government in this matter is the same brief as filed by the Government in the case of U.S. vs Helen Mae Lane; U.S. vs Honorable Fred Kunzel, No. 16874. In such case, reply briefs were filed on behalf of Appellee Helen Mae Lane and on behalf of Honorable Fred Kunzel. In addition, an amicus curiae brief was filed by Howard R. Harris, attorney at law. Mr. Harris is attorney for Appellees and Respondent in the instant case.

We prefer not to repeat verbatim the arguments set forth in the foregoing reply briefs. We will state the principles of law which we believe to be applicable, but ask the Court to refer to the briefs in the prior case.

A. THE TRIAL COURT HAD THE POWER TO SUSPEND APPELLEES SENTENCES AND PLACE THEM ON PROBATION UNDER THE YOUTH CORRECTIONS ACT OF 1950.

The Youth Corrections Act is an entire system of treatment for youth offenders. No single provision may be extracted from that act and nullified. The Government admits that the Act was not repealed in whole in its application to narcotic offenders by the Narcotics Control Act of 1956. We submit that neither was it repealed in part.

It is a cardinal principle of statutory construction that repeals by implication are not favored. Where there are two acts on the same subject, effect should be given to both if possible. U.S. vs Borden Co. 308 U.S. 188–198, 84 L. Ed. 181–190, 60 S. Ct. 182.

Section 5010(a) (U.S.C., Title 18) is an essential part of the Youth Corrections Act. It is justice by whim to say that: "5010(b) and 5010(c) are fine and good, but 5010(a) obviously does not apply."

The Government makes certain statements about the "obvious" intent of Congress. First, with respect to the effect of the Narcotics Control Act on the Youth Corrections Act; secondly, whether the Youth Corrections Act created a grant of power independent of the general probation statute. We find nothing in the Narcotics Control Act, or its legislative history, which mentions or refers to the Youth Corrections Act. If Congress considered the effect of the Youth Corrections Act at the time they enacted the Narcotics Control Act, it did not say so. They did refer to the application of other statutes specifically.

As to whether Congress intended the power to grant probation under the Youth Corrections Act to be separate and apart from the general probation statute, there are provisions of 5023(a) which provides as follows:

> "Nothing in this chapter shall limit or affect the power of any court to suspend the imposition or execution of any sentence and place a youth offender on probation or be construed in any wise to amend, repeal, or affect the provisions of chapter 231 of this title relative to probation."

If the contention of the Government is correct, there would have been no need to enact Section 5010(a), inasmuch as under Section 5023(a) the power of the Court to grant pro-

bation under the general probation statute is not affected by the Youth Corrections Act.

It is a duty of the Court to give effect, if possible, to every clause and word of a statute. U.S. vs Menasche, 348 Y.S. 528, 99 L. Ed. 615, 75 S. Ct. 513; Higa vs Transocean Airline, 230 F. 2d 780–784. Thus Section 5010(a) should not be construed so as to give it no meaning.

In any event Congress has not stated its intention in words specific. As stated by Judge Frankfurter in the Bell vs U.S., 349 U.S. 81, 94 L Ed. 905, 75 S. Ct. 620 ,

> "When Congress has the will, it has no difficulty in expressing it".

Congress did so specifically in enacting the 1958 amendment pertaining to young adult offenders (18 U.S.C. 4209, PL 85–752, 72 Stat. 845), and specifically precluded the application of such amendment to narcotics offenders.

It is submitted that the Court has the power to grant probation to youth offenders, though the youth offenders may have been convicted of a narcotics offense.

B. A PENAL STATUTE SHOULD BE STRICTLY CONSTRUED.

Reference is specifically made to amicus curiae brief filed in Case No. 16874, above referred to. We ask permiss-

ion to incorporate said brief by reference.

Although many of the cases cited in the amicus curiae brief refer to the definition of a crime rather than the sentencing provisions with relation to such crime, it is clear that the sentencing provisions are as essential to a criminal statute as any other provision.

In the case of U.S. vs Evans, 333 U.S. 483, 92 L. Ed. 823, the provisions of the alien harboring statute were rendered meaningless by the omission of the sentencing provisions. Thus, the general rule prevails as stated in Bell vs U.S. supra,

> "It may fairly be said to be a pre-supposition of our law to resolve doubts in the enforcement of a penal code against an imposition of a harsher punishment."

C. THIS COURT HAS NO JURISDICTION OF THIS APPEAL.

The Government's right to appeal in criminal cases is governed by 18 U.S.C. 3731. An appeal from a grant of probation is not one of the cases specified under such section. As stated by the Supreme Court in Carroll vs U.S., 354 U.S. 394, 1 L. Ed. 2d 1442, appeals by the Government in criminal cases are something unusual, exceptional, unfavored. The exceptions arethose precisely authorized by statute.

The fact that the Government has an interest in a number of sentencing problems does not give jurisdiction to the appellate court to hear an appeal by the Government. This is a legislative and not a judicial matter.

The Government sets forth cases where it was held that an appeal lies when the court purports to grant the defendant probation some time after the judgment of conviction and sentence.

In view of the Carroll case, supra, these cases should be restricted to their facts and not be enlarged.

It is obvious that the sentencing of a defendant is part of the judgment of conviction and it is not an independent act which is separately appealable under 28 U.S.C. 1291 . The Government's contention that the order of court suspending imposition of sentence in granting probation can be considered separately from the judgment of conviction is obviously erroneous. The judgments are set forth in pages 7, 8 and 9 of the transcript of record. Each entire document is entitled "Judgment". Since 18 U.S.C. 3731 does not provide for such appeal, this Court has no jurisdiction to entertain this appeal.

D. THE PETITION FOR WRIT OF MANDAMUS SHOULD BE DENIED.

Permission to use mandamus as a remedy lies within the sound discretion of the court. Mandamus should be sparingly granted and only when it is absolutely necessary in order to prevent injustice or great injury. La Buy vs Howes Leather Co., 352 U.S. 249 (1956); Ex Parte Republic of Peru, 318 U.S. 578 (1942) .

> "It has also been said that mandamus is an extraordinary remedy, available only in rare cases (Ex Parte Colleti, 337 U.S. 55, 72, 68 S. Ct. 844, 959, 93 L. Ed. 1207), and that courts will proceed with great caution before granting relief in the nature of mandamus." Laughlin vs Reynolds 90 U.S. App. D.C. 414, 198 F. 2d 363."

United States vs Carter, 270 F. 2d 521 at 524(9th Cir. 1959).

In the instant case, the defendants were sentenced on May 16, 1960. The motion for leave to file a petition for writ of mandamus was not filed until October 15, 1960, five months later.

Both defendants had never been in trouble with the police officials previously Between the time of conviction and the time of sentence, appellee, Ronald Wachs was married. There is nothing to indicate that both have not been complying strictly with all probationary orders. Both boys are on their

way to rehabilitation. Incarceration at this time would be a grievous miscarriage of justice. (Tr. p. 30)

The Government may contend that it was perfecting its appeal during the intervening period. "Dragging their feet" would be more appropriate description.

Notice of appeal was filed by the Government on June 3, 1960. (Tr. p. 15,16) From that time until July 8, 1960, nothing was done to perfect such appeal. On July 8th, the Government moved to extend the time within which to file the record on appeal, to September 1, 1960. (Tr. p. 17, 18) The reason for the extension was not that the transcript was lengthy, or that it could not be prepared by the clerk in adequate time; on the contrary, the record is quite brief, as appears from the 36 pages of the transcript. The Court granted the order extending time; (Tr. p. 19, 20) however, appellees moved to set aside the order extending time. (Tr. p. 21,22) The Court heard the matter on July 20th and modified the order of court to give the government until August 1,1960, in which to doc - ket the record on appeal. (Tr. p. 23) The Government designated the record on appeal the following day on July 21, 1960. This could just as well have been done on June 4, 1960.

Actually, had the government proceeded promptly, the instant case could have been heard with that of the Lane case, No. 16874.

The situation is not substantially different than in the case of U.S. vs Carter, supra. It is respectfully submitted, that the petition for the Writ of Mandamus should be denied.

Respectfully submitted,

Howard R. Harris

Attorney for Appellees and Respondant

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OPINIONS BELOW

There was no opinion by the court below. The judgment of the District Court for the Southern District of California is printed at pp. 7–9 of the Record. The order of the District Court denying the Government's motion to correct an illegal sentence is found at pp. 13, 14 of the Record.

JURISDICTION

This Court has jurisdiction of the appeal under 28 U.S.C. 1291. It has jurisdiction to issue a writ of mandamus under 28 U.S.C. 1651.[1]

STATEMENT OF THE CASE

On March 30, 1960, Kenneth Eugene Gibbs and Ronald Charles Wachs were indicted in the District Court for the Southern District of California for the illegal importation of marihuana, a violation of 21 U.S.C. 176(a). They were convicted upon their pleas of guilty and on May 16, 1960, Judge James A. Carter suspended the imposition of sentence and placed them on probation for a period of five years, relying upon the Youth Corrections Act, 18 U.S.C. 5010(a).

On May 18, 1960, the Government filed a motion under Rule 35 to correct the sentence (R. 10). The court denied the motion on May 24, 1960 (R. 12). This appeal and petition for writ of mandamus followed.

SPECIFICATION OF ERROR

The District Court erred in suspending the imposition of sentence and in placing the defendants on probation.

SUMMARY OF ARGUMENT

The Narcotics Act of 1956 specifically prohibits suspension of the imposition of sentence and the granting of probation in cases where the defendant has been convicted of the illegal importation of marihuana.

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[1] The jurisdiction of the Court is discussed in detail at pp. 11–17, *infra*.

Section 5010(a) of the Youth Corrections Act of 1950 did not confer power to grant probation to youth offenders. The only purpose of section 5010(a) was to make clear that the new type of treatment afforded by the Youth Corrections Act did not override the power previously granted by section 3651; it did not constitute a new and independent grant of power. Youth offenders are not excepted from the prohibition of the Narcotics Act and the order placing the defendant on probation is void.

The United States has the right to appeal this decision under 28 U.S.C. 1291. Although this is a criminal case, appeal from the order involved here comes within the exceptions to the limitations of the Criminal Appeals Act. Even if there is no right of appeal, this Court may grant relief in the nature of a writ of mandamus.

ARGUMENT

I. The judgment of the district court suspending the imposition of sentence and placing the defendant on probation was illegal

The defendants were convicted of a violation of 21 U.S.C. 176(a), which was enacted as subsection (h) of section 2 of the Narcotic Drugs Import and Export Act of 1956. This legislation eliminated certain previously available sentencing alternatives even with respect to a first offense violation of section (176a). As codified in 26 U.S.C. 7237(d), it states:

> Upon conviction (1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Ex-

> port Act, as amended, or such Act of July 11, 1941, as amended, or (2) of any offense the penalty for which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense, the imposition or execution of sentence shall not be suspended, probation shall not be granted, section 4202 of title 18 of the United States Code shall not apply, and the Act of July 15, 1932 (47 Stat. 696; D.C. Code 42–201 and following), as amended, shall not apply.

It is clear from the above language that suspension of the imposition of sentence and the grant of probation to an offender convicted of a violation of 21 U.S.C. 176(a) would be invalid. Cf. *Deutschmann* v. *United States,* 254 F. 2d 487, 488 (9th Cir., 1958); *Lathem* v. *United States,* 259 F. 2d 393, 396–397 (5th Cir., 1958).

It will be noted that the language of the statute is sweeping and all-inclusive and that it allows for no exceptions. In particular, no specific exception is made for the benefit of youth offenders, and there is nothing in the language from which such an exception could be implied.[2]

The conclusion that the prohibition on suspension of the imposition of sentence and the granting of probation applies to all offenders, convicted of the

[2] By way of comparison, the prohibition in 26 U.S.C. 7237(d) is specific as to certain parole statutes, but general as to probation (18 U.S.C. 4202 is mentioned, but not 18 U.S.C. 5015 of the Youth Correction Act). This compels two conclusions: (1) there is only one probation grant; (2) if there were more than one probation grant, all such grants are included in the prohibition.

offenses specified in section 7237(d), regardless of age, is fortified by the legislative history of the Narcotics Act. That history makes it abundantly clear that Congress not only had no intention of exempting youth offenders from the prohibition against probation but that it specifically intended to reach such offenders under the new provisions. Typical of many comments to that effect is the following one, found in House Report No. 2388 of the Committee on Ways and Means to accompany H.R. 11619 (Vol. 2, U.S. Code Cong. & Ad. News, 84th Cong., 2d Sess., pp. 3274, 3303–3304):

> * * * We have adduced substantial evidence that because of the severe penalties on repeating offenders and the fact that suspension and probation are not available in the case of an individual with a record of prior narcotic convictions there has been an increase in first offender traffickers. Repeating offenders subject to the heavier mandatory penalties under the Boggs law have moved into the background and recruited *young hoodlums* as peddlers in the narcotic traffic. These recruits are subject to the minimum mandatory sentence of 2 years with the possibility of suspension or probation * * * The majority of these individuals have prior records of crime * * * With the possibility of receiving probation or a suspended sentence, these unscrupulous individuals are willing to risk apprehension for the fantastic profits derived from this type of crime * * * Unless immediate action is taken to prohibit probation or suspension of sentence, it is the subcommittee's considered opinion that the

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> first-offender peddler problem will become progressively worse and eventually lead to the large-scale recruiting of our *youth* by the upper echelon of traffickers. [Emphasis added.]

Clearly, Congress intended that narcotics offenders, whether of the youthful variety or otherwise, would not be eligible for probation.

In his judgment suspending the imposition of sentence and placing the defendant on probation, Judge Carter cited a provision in the Youth Corrections Act, 18 U.S.C. 5010(a), as his statutory authority. This subsection provides:

> (a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

As indicated, the prohibition of the 1956 narcotics statute is specific and admits of no exception. Certainly, no exception should be implied by virtue of a youth rehabilitation statute enacted six years earlier where the history of the later statute make it plain that youth offenders were among the very groups which were intended to be reached by its strict prohibitions. However, even if it be assumed, *arguendo,* that the prohibition on probation of the narcotics statute applies only to cases falling under the Federal Probation Act (18 U.S.C. 3651)—and obviously it applies at least to them—it would make no difference here since even with respect to youth offenders the ultimate source of probation authority is the general probation statute.

The federal courts have no non-statutory authority to grant probation. Their power in this respect derives wholly from the Probation Act of 1925, 43 Stat. 1259, now 18 U.S.C. 3651. Prior to 1925, no such power existed. *Affronti* v. *United States,* 350 U.S. 79, 80, 83 (1955); *Ex parte United States,* 242 U.S. 27, 41–42 (1916). *A fortiori,* no such power exists today in the absence of statutory authority.

It is clear that the Youth Corrections Act did not, and was not intended to, create a grant of power independent of the general probation statute. The Youth Corrections Act recognized that young offenders should be afforded a type of treatment not available to adults. To accomplish this, it added to the means of sentencing available to the court the additional one of treatment under the supervision of the Youth Division of the Board of Parole. (18 U.S.C. 5006–5026.) Specific reference is made in the statute to the fact that the court may still avail itself of (1) the regular sentence of imprisonment, and (2) suspension of the imposition of sentence and probation.[3] Thus section 5010(a) enumerates the probation alternative, and section 5010(d) lists the imprisonment

[3] Congress undoubtedly wished to avoid any confusion on this score in view of the proposals contained in the Model Youth Authority Act (ALI Model Youth Correction Authority Act (1940), Introductory Explanation, p. xvi; section 13; comment on section 30) that the power of the judge to grant probation to youthful offenders be entirely supplanted by the new Youth Authority. This had caused much judicial and other opposition. See Appendix, especially pp. 25 and 28–29.

alternative.[4] But that is not to say that under the Youth Corrections Act these alternatives are available where they otherwise would not be. That this is so is made quite clear by section 5023(a) which provides:

> (a) Nothing in this chapter shall limit or *affect* the power of any court to suspend the imposition or execution of any sentence and place a youth offender on probation or be construed in any wise to amend, repeal, or *affect* the provisions of chapter 231 of this title * * * relative to probation. [Emphasis added.]

It is apparent, therefore, that the otherwise existing powers of the court are not affected by the Youth Corrections Act: they are not diminished thereby nor are they enlarged. Specifically, if an offender is eligible for probation under the general probation statute, he is still eligible, notwithstanding the fact that he is a youth offender. But if the offense is one for which probation is not allowed, the Youth Corrections Act does not empower the courts to grant it.

Moreover, it is not likely that Congress would have intended 18 U.S.C. 5010(a) as a grant of probation apart from chapter 231, 18 U.S.C. (the probation chapter). For if it did, none of the procedural and substantive provisions of chapter 231 would apply to one to whom probation is granted under 5010(a); that is, there would be no listing

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[4] 18 U.S.C. 5010(d) provides:

"(d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision."

of the duties of probation officers; no authority for a probation officer to arrest for cause without a warrant those under his supervision; and a lack of other provisions which are no doubt necessary to a smoothly functioning probation system. Thus, unless it be assumed that the sentencing judge must set up the requisite machinery every time he sentences a youth offender under section 5010(a), that section must be deemed a part of the machinery set up by chapter 231. One of two consequences must flow from this conclusion: (1) that section 5010(a) has no effect whatever, for any effect it would have would be upon chapter 231 (i.e., section 3651 thereof), and this cannot be in view of the prohibition in section 5023(a) that the Youth Corrections Act shall not "affect the provisions of chapter 231 * * *"; or (2) that section 5010(a) amends, and becomes a part of, chapter 231, and thus, in turn, is affected by the prohibition on probation in 26 U.S.C. 7237(d), which, as we have noted, applied at the very least to the general grant of probation contained in section 3651 (see p. 11, *infra*).

The legislative history of the Youth Corrections Act supports this interpretation. The Report of the Committee on the Judiciary to accompany S. 2609 (House Report No. 2979, Vol. 2, U.S. Code Cong. & Ad. News, 81st Cong., 2d Sess., pp. 3983, 3985) states:

> * * * * The problem is to provide a successful method and means for treatment of young men between the ages of 16 and 22 who stand convicted in our Federal courts and are not fit subjects for supervised probation—a

method and means that will effect rehabilitation and restore normality, rather than develop recidivists.

Those statements from the hearings on S. 2609 which define the relationship of the Youth Corrections Act to probation are set out in the Appendix, pages 17–26. Also included in the Appendix at pages 27–33 are statements from hearings conducted by subcommittees of both the Senate Judiciary Committee on S. 895 and the House Judiciary Committee on H.R. 1140, in the 78th Congress, First Session. The latter bills were not submitted to Congress, but they both contain provisions identical to those of the present Youth Corrections Act showing the relationship of the new sentencing powers to probation.

All of the statements from both sets of hearings consistently demonstrate that the new method of treatment afforded by the Act did not include probation, although a judge was not precluded from granting probation if he otherwise had the authority to grant it.[5]

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[5] This was clear also to George J. Reed, first Chairman of the Youth Corrections Division of the United States Board of Parole, for he stated in an article on the Youth Corrections Act in Federal Probation, Vol. XVIII, Number 3 (September 1954), at page 12:

"After the conviction of a youth offender the court may:

"1. Suspend imposition or execution of sentence and place the youth offender on probation, for which purpose the Probation Act is available."

Note Flow Chart of Operations under Youth Corrections Act at page 13 of that same article.

Similarly, Orie L. Phillips, Chief Judge, United States Court of Appeals for the Tenth Circuit and Chairman of the Sub-

In short, (1) the Youth Corrections Act does not contain an independent grant of power to suspend the imposition of sentence and to place the offender on probation, (2) if there is any such power it resides in the general Probation Act, 18 U.S.C. 3651 (3) the prohibition on probation in the Narcotics Control Act of 1956, at a minimum, applies to the provisions of the general Probation Act; therefore, (4) a youth offender is as much affected by the prohibition on the grant of probation under section 3651 as an adult offender; *i.e.,* probation is not available as a sentence if he is convicted of importing heroin illegally.

II. This court has jurisdiction

A. An appeal lies from the grant of probation

The judgments of the District Court were entered May 16, 1960; notices of appeal were filed June 3, 1960.

Appeal is sought from this judgment under 28 U.S.C. 1291, which provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

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committee on Youth Offenders of the Committee on Punishment for Crime of the Judicial Conference of the United States which drafted the Youth Corrections Act, spoke of the Act as a "complement to our probation system" in an article in Federal Probation, Vol. XV, Number 1 (March, 1951) at page 3.

See also, Appendix, pp. 17–33.

While the Government's right to appeal in criminal cases is governed by 18 U.S.C. 3731, the Criminal Appeals Act, it has been held many times that where an order relating to a criminal case is essentially independent thereof it may be appealed outside the Criminal Appeals Act. Thus, the Supreme Court stated in *Carroll* v. *United States,* 354 U.S. 394 (1957) at 403:

> It is true that certain orders relating to a criminal case may be found to possess sufficient independence from the main course of the prosecution to warrant treatment as plenary orders, and thus be appealable on the authority of 28 U.S.C. 1291 without regard to the limitations of 18 U.S.C. 3731 * * *

See also *Stack* v *Boyle,* 342 U.S. 1 (1951); *Cohen* v. *Beneficial Loan Corp.,* 337 U.S. 541 (1949).

The instant case comes squarely within that rule. The order of the court suspending the imposition of sentence and granting probation can clearly be considered separately from the judgment of conviction. The defendant having been found guilty on her plea of guilty, the Government obviously is not appealing from that decision, and the question of her guilt can be considered separately from the legality of her sentence. *United States* v. *La Shagway,* 95 F. 2d 200 (9th Cir., 1938); *United States* v. *Cook,* 19 F. 2d 826 (5th Cir., 1927), *affirmed,* sub nom, *United States* v. *Murray,* 275 U.S. 347; *United States* v. *Albrecht,* 25 F. 2d 93 (7th Cir., 1928); *Stack* v. *Boyle,* 342 U.S. 1 (1951); and *Cohen* v. *Beneficial Loan Corp.,* 337 U.S. 541 (1949).

It should be noted in this connection that there are a number of sentencing problems in which the Government has an interest which should be protected, if necessary, by appeal. This includes not only the restrictions against probation in 18 U.S.C. 3651 and 26 U.S.C. 7237(d), but also those pertaining to offenses which have a mandatory minimum penalty.

B. If an appeal does not lie a writ of mandamus should issue

If the Government has no right to appeal the judgment of the lower court, this Court has jurisdiction to issue a writ of mandamus under 28 U.S.C. 1651,[6] directing the District Court to sentence these defendants in accordance with the provisions of the statute under which they were convicted.

Judge Carter's action in granting probation was illegal. More, since the power of a court to grant probation derives from Congressional enactment, the action of the court below also violated the principle of the separation of powers. In *Ex parte United States,* 242 U.S. 27, 42 (1916), the Supreme Court issued a writ of mandamus restraining a District Court from suspending sentence where a minimum penalty was required by statute. The Supreme Court found the District Court's practice to be inconsistent with the Constitution because it "amounts to a refusal by the

[6] 28 U.S.C. 1651 provides:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principals of law.

"(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

judicial power to perform a duty resting upon it and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the Constitution." 242 U.S. at 52. In like manner, the Courts of Appeals have power to issue writs of mandamus to District Courts to insure "proper judicial administration in the federal system." *LaBuy* v. *Howes Leather Co.,* 352 U.S. 249, 259–260 (1956); *United States* v. *District Court,* 334 U.S. 258, 263 (1947); *Roche* v. *Evaporated Milk Assn.,* 319 U.S. 21, 26 (1942).

To be sure, the Court has discretion on whether to issue a writ, but the situation here is such that it is even more imperative that such relief be granted than it was when the Supreme Court granted similar relief in *Ex parte United States, supra.* There the Court restrained the lower court because it was suspending the imposition of sentence where Congress had not specifically said it could; here, the District Court has suspended the imposition of sentence and has granted probation where Congress has specifically prohibited it from so doing.

If the no-probation provisions of the Narcotics Act seem harsh, any amelioration is of course for Congress.[7] Moreover, the alternative to probation is not a term in the penitentiary. Judge Carter may use the available treatment provisions of the Youth Corrections Act and sentence defendants under 18 U.S.C. 5010(b). This would require them to be placed in the

[7] As this Court stated in *Tanzer* v. *United States*, 278 F. 2d 137, 140 (9th Cir., 1960), Congress undoubtedly intended that the Act be harsh.

custody of the Youth Corrections Division initially for a period of time, usually thirty days, for purposes of classification. During this time the Division would make a complete study of them, including a physical and mental examination, to ascertain their personal traits, their capabilities, pertinent circumstances of their school, family life, any previous delinquency or criminal experience, and any mental or physical defect or other factor contributing to their delinquency (18 U.S.C. 5014). At the conclusion thereof, they would be interviewed by a member of the Division, and a decision would be made on whether to release them conditionally, transfer them to an appropriate agency or institution for treatment, or order their confinement and treatment within the Division (18 U.S.C. 5015). Should the Division see fit to release them conditionally, they would be supervised by a United States Probation Officer, who would have the benefit of the comprehensive study made during the classification period. It is reasonable to assume that this would result in a more fruitful period of supervision, thus better assuring their adjustment to a normal life. If they are not conditionally released at the end of their classification period, it would be because the Division believes that they would benefit more from treatment under closer supervision.

In *United States* v. *Carter,* 270 F. 2d 521, 524 (9th Cir., 1959), this Court declined to grant mandamus relief "on the ground that because of the lapse of time and of defendants' long reliance on judgments *only recently challenged,* the setting aside of the district court orders would work a substantial hardship on

the affected parties." [Emphasis added.] In that case two of the defendants had been on probation over a year and the third, a girl, had been on probation only a little more than four months, but she had since married. In this case, the defendants were placed on probation by orders of the district court filed May 16, 1960. Motions to correct these illegal sentences were made on May 18, 1960, and denied on May 24, 1960. Notices of appeal were promptly filed thereafter on June 3, 1960 (R. 15, 16). Defendants' reliance on the judgment of the district court in this case should have been short-lived, as the challenge came only two days after the orders were filed. Even when this challenge was defeated, the prompt action of the Government in filing notices of appeal should have raised the possibility that the probation order might be set aside by the Court of Appeals. Clearly, the situation in this case is different from that which caused the Court to deny the Government's petition in the previous *Carter* case.

Petitioner-appellant respectfully calls the Court's attention to the significance of the fact that the appellees are the fifth and sixth defendants illegally placed on probation in practically identical cases which were brought to the attention of this Court since June, 1959. In the previous *Carter* case there were three such defendants and last month the Court heard oral arguments on a fourth case in *United States* v. *Helen Mae Lane,* No. 16, 874. All of these cases are from the District Court for the Southern District of California. It may fairly be assumed that that court will continue in its invalid position unless this Court

decides the issue on a review such as is sought herein. The result will be that probation will be granted to narcotics youth offenders in California but nowhere else in the nation at a time when great effort is being expended in the name of justice to achieve uniformity in sentencing.

CONCLUSION

It is respectfully requested that Judge Carter's orders suspending the imposition of sentence and placing Kenneth Eugene Gibbs and Ronald Charles Wachs on probation for a period of five years be reversed and the case remanded with instructions to sentence in accordance with applicable law; or, in the alternative, that a writ of mandamus issue to compel Judge Carter to exercise the judicial discretion entrusted to him in a manner not inconsistent with the specific directive of the Narcotics Act.

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OCTOBER 1960.

APPENDIX

Index to Appendix

I. Correctional System for Youth Offenders

HEARINGS BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, EIGHTY-FIRST CONGRESS, FIRST SESSION, ON S. 1114 AND S. 2609

Statement of Bolitha J. Laws, Chief Judge, United States District Court for the District of Columbia[1]

[P. 13] Judge Laws. As to sentencing of youth offenders, in addition to the judge's present power to place on probation or to sentence under existing statutes, the bill gives him three new alternatives in handling offenders under 24. First, the judge may commit a youth offender for diagnoses and treatment under this act for an unspecified period up to 6 years, with provision that he be tried on conditional release within 4 years.

Secondly, if the judge feels that a youth offender convicted of an offense calling for a long term under existing statutes might not respond to treatment within 6 years or that so short a term might have an adverse effect on enforcement of the law, he may set any maximum authorized by law but still give the offender the benefits of treatment under this act.

Thirdly, if the judge wants more information on a youth offender before sentencing him, he may order a thorough pre-sentence diagnosis at a classification center set up by the Bureau of Prisons.

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[1] Died, November 14, 1958. Although a member of the Committe on Punishment for Crime, he was not a member of the subcommittee on youth offenders which drafted this legislation. Nevertheless, Judge Phillips acknowledged his assistance (Hearings, 81st Cong., p. 62).

It should be noted that the bill in no way reduces the authority or interferes with the sentencing power of the judges.

Statement of James V. Bennett; Director, Bureau of Prisons

[P. 25] Mr. BENNETT. The judge under this bill can now place the man on probation, he can sentence him as a youth offender for a maximum of 6 years or he can sentence him as a youth offender for whatever maximum the statute will permit.

Statement of Hon. John J. Parker, United States Circuit Judge[2]

[Pp. 43–44] Judge PARKER. I would like to speak briefly, if I may, first in analyzing the act and second giving the reasons why I think the act is desirable.

In the first place the act deals only with offenders under 24 years of age. In the second place, it does not interfere with the power of the judge even with respect to those offenders, but gives him merely an alternative method of treatment of those people. That is to say, under this bill the judge may still admit the youthful offender to probation. There is nothing in the bill that prevents that. He may still give the youthful offender the punishment prescribed by existing statutes, there is nothing in the bill that prevents that. All that the bill does is to provide that if in his judgment and discretion, he thinks that the offender before the court is one that can be treated with advantage under this bill, he can sentence him under this bill instead of under existing law.

[2] Died March 17, 1958. He was Chairman of the Committee on Punishment for Crime of the Judicial Conference at the time the subcommittee drafted the Youth Corrections Act.

He may give him, under this bill, what was called corrective treatment and by corrective treatment we mean three things: First, with respect to the classification of the offender for purposes of punishment; second, with respect to the kind of punishment that is going to be inflicted; and third, with respect to his rehabilitation in society after his punishment has been served.

In the first place when a man goes to a correction center under this act he is studied by experts with respect to his physical and mental characteristics and his background and is assigned to an institution where he will be able to receive the kind of corrective treatment that he needs. I will say right there that the bill provides, not only contemplates but expressly provides, that there is to be a separation made between these men and the ordinary hardened offenders that are sentenced to prison, so that the young man under 24 years of age who has strayed from the path of virtue but is not hopeless, can be brought back to good conduct and not subjected to the baleful influence of being associated with hardened criminals in prison.

Now the next thing that it does is provide that he shall be given work training and adequate supervision during his period of incarceration. He is to do useful work, not for just a few hours a day, but real work. He is to do it in a way that will train him for a useful life after he leaves the institution. He is to be taught a trade, in other words.

In the third place, he is to be actively and effectively supervised by men who are trained by handling youth of that character.

The third thing that the act contemplates is conditional release. After a man is sentenced, irrespective of the time provided in the statute defining the crime, if he is sentenced under this act he is sentenced to at

least 6 years of corrective treatment even though the act may prescribe only 2 years' punishment. When he goes in under this system he may be kept under its supervision for 6 years. But he may also be released at any time. The next day after he is imprisoned, if the authorities think he ought to be released he may be released at once, conditionally, that is to say if he does not behave himself he can be brought back to jail again.

After he has been in confinement for a year he can be released unconditionally if it is thought proper. But, the act provides that whatever the situation he shall be released at least conditionally at least 2 years before the expiration of the sentence so that he can be observed and supervised as he enters into the life of society again.

Now there is one provision in this bill that was not in the other bill. It was thought that perhaps 6 years would not be long enough for some offenders, some judges might think that a man needed more treatment than for 6 years and under those circumstances they can give him a period of treatment not exceeding the maximum punishment prescribed in the act.

Mr. Chairman, that is roughly the provision of the act as I understand it. I do not see any possible objection to it. They say that there are some of these fellows that ought to be given serious punishment notwithstanding their being young and it does not prevent their being given serious punishment. Nothing prevents a man from getting 25 years punishment if he deserves it. Nothing prevents his being executed if he deserves such sentence.

On the other hand, there is nothing to prevent the judge from sentencing him to probation if he thinks that is to be done.

All it provides is that in the case of those who need treatment, in the opinion of the judge, the judge shall be able to give them that treatment and reclaim them to society.

* * * * *

[P. 49] Judge PARKER. Of course, there are some of them that ought to be punished and there is nothing in the bill that prevents that. Some of them might be given probation without any further punishment; there is nothing that prevents that.

But, there are many of them that can be reclaimed for society by intelligent treatment, and the purpose of this bill is to make that possible.

* * * * *

Statement of Hon. Carroll Hincks, United States District Judge[3]

[P. 52] Judge HINCKS. In other cases probation has been tried and it has not been enough. In some cases it has been enough. Well, certainly the only question before me there was probation or a moderate sentence. I certainly would not want to send the boy to a jail, he had not rated that yet.

Under those circumstances there was more chance that his character would be warped than straightened. I am pretty sure I put him on probation because there really was not any other sensible thing to do.

Senator KILGORE. In other words, it was the lesser of two evils?

Judge HINCKS. Yes.

Now if this act had been in effect I am very sure I should have resorted to section 5010 which says:

> If the court desires additional information as to whether a youth offender will derive benefit

[3] Appointed to United States Court of Appeals for the Second Circuit on October 3, 1953 and now retired.

from treatment, it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within 60 days from the date of the order, or such additional period as the court may grant, the division shall report to the court its findings.

Senator GRAHAM. That would give you a follow-up on the boy too?

Judge HINCKS. That would give me a sounder basis for making my decision. As it was, I had nothing but hope to go on. While I feel that hope is better generally than despair, it is not as good as reasoned experience.

Statement of Orie L. Phillips, Chief Judge, United States Court of Appeals, Tenth Circuit[4]

[P. 60] Judge PHILLIPS. I am not unmindful that rapid strides have been made in recent years toward a more scientific teratment [sic] of offenders under the Federal system. New institutions make possible some classification and segregation of classes. Many offenders of the type suitable to be placed under supervised probation are being rehabilitated by the effective work of probation officers. Nevertheless, I am convinced that the system is in many respects defective with respect both to personnel and facilities for the handling of youth offenders.

Most of the causes which contribute to antisocial conduct of youth offenders in the period between adolescence and maturity disappear when the youth reaches full maturity. Our problem is to provide a successful method and means for treatment of young men between the ages of 16 and 23 who stand con-

[4] Now retired. He was chairman of the subcommittee on youth offenders which drafted the Act.

victed in our Federal courts and are not fit subjects for supervised probation—a method and means that will effect rehabilitation and restore normality, rather than develop recidivists.

S. 2609 is designed to provide methods and means that will effect such rehabilitation and restore normality. It is not experimental. It is based on the principles and procedures developed under what is known as the Borstal system in England, which has been in successful operation since 1794.

* * * * *

It defines "youth offender" as a person under the age of 24 years at the time of conviction. It defines "treatment" as corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders.

* * * * *

[P. 61] Under its provisions, if the court finds that a youth offender does not need treatment, it may suspend the imposition or execution of sentence and place the youth offender on probation. Thus, the power of the court to grant probation is left undisturbed by the bill.

* * * * *

[P. 69] Senator KILGORE. Eleven contended that this thing overlapped and duplicated efforts and services now rendered by the Federal Parole and Probation Departments.

Judge PHILLIPS. Of course, if they are put on probation they are not touched by this act.

Supervision of a person conditionally released under this act or released under the Parole Board, is the same type of supervision except that we hope it will be an improved supervision.

II. Federal Corrections Act and Improvement in Parole

HEARINGS BEFORE SUBCOMMITTEE NO. 3 OF THE COMMITTEE ON THE JUDICIARY—HOUSE OF REPRESENTATIVES, 78TH CONGRESS, 1ST SESSION, ON H.R. 1139 AND H.R. 1140

Statement of Hon. John J. Parker, Senior Circuit Judge, Fourth Judicial Circuit

[P. 6] In 1927 we passed the probation law, which authorizes the judge, in passing sentence, instead of incarcerating the prisoner, to admit him to probation under such terms as may be just or as may be helpful in his reformation. That has been a very successful piece of legislation. I shall not go into the statistics with regard to it, but I think that none who has observed the Federal courts since 1927 can have the least doubt but that the Federal probation laws have been salutory. But we have realized something in addition to that is necessary.

There are three defects in the present system of sentencing in the Federal courts. The first is a lack of sufficient knowledge on the part of the sentencing judge.

* * * * *

[P. 7] Now, the second defect is the diversity in length of sentences.

* * * * *

Then the third is this: There is in the present system an absolute lack of coordination between the sentencing and the paroling authorities.

* * * * *

[Pp. 8, 9] I am speaking now of H.R. 2140; yes.

Now, with respect to criminals generally, the bill says this: We leave probation exactly where it is,

that is, in the hands of the district judge. His exercise of the power of probation is not subject to review by anyone.

[P. 11] The board is authorized to admit such youth offender to probation under supervision at any time that it sees fit, and is required to admit him to probation under supervision after he has served 4 years. For the remaining 2 years he is under the supervision of the Federal parole officer, subject to reincarceration if he does not behave himself.

Statement of Francis Biddle, Attorney General of the United States[5]

[P. 17] No less important than the proposal with respect to adult offenders is that portion of the bill which would extend the treatment methods available to the trial judge to the case of offenders under 24 years of age. Based in large measure upon the study and recommendations of the American Law Institute, the bill authorizes the judge to sentence the youth to the custody of a division of the proposed board for special treatment and supervision. The court is not required to follow this course. As in the case of adult offenders, sentence may be suspended or the defendant may be placed on probation, or, indeed, the court may sentence the youth as it would an adult under the first title of the bill. The special treatment authorized is merely an additional possibility to be employed in cases where the youth will benefit from the type of special treatment and supervision contemplated for his rehabilitation.

[5] His term ended June 30, 1945.

Statement of Hon. Orie L. Phillips, Senior Circuit Judge, Tenth Judicial Circuit

[P. 31] Under the provisions of title III, if the court finds that a youth offender does not need treatment, it may suspend the imposition or execution of sentence and place the youth offender on probation. Thus, the power of the court to grant probation is left undisturbed by the bill.

* * * * *

[Pp. 34, 35] Mr. ROBSION.[6] Does the court have to sentence a youth offender to the Authority?

Judge PHILLIPS. No; the court may place the youth offender on probation. He may sentence him to the Authority if he thinks he would derive benefit from correctional treatment. But if he concludes the youth offender should not be either placed on probation or sentenced to the Authority he may sentence him as any other offender under title II of the act.

Mr. ROBSION. But does the court have to sentence him to the Authority?

Judge PHILLIPS. No; the matter is in the court's discretion. He can place him on probation, he can sentence him to the Authority, or he can sentence him under title II.

Mr. ROBSION. Can the court's action in placing the youth offender on probation be reviewed?

Judge PHILLIPS. No; when the court places an offender on probation that is the end of it, unless the judge revokes the probation and re-sentences him.

* * * * *

[P. 37] Mr. CRAVENS.[6] Does this bill in any way affect the so-called probation system?

[6] Representatives John M. Robsion of Kentucky and Fadjo Cravens of Arkansas. They were not members of the subcommittee.

Judge PHILLIPS. Not at all.

Mr. CRAVENS. There is no attempt to disturb that?

Judge PHILLIPS. No, sir; we found it was working well and concluded it ought not to be disturbed.

Mr. CRAVENS. And this bill was drafted with that in mind?

Judge PHILLIPS. Yes, sir. It leaves it absolutely undisturbed.

Statement of Hon. Bolitha J. Laws, Associate Justice, District Court of the United States for the District of Columbia

[P. 66] In any case of that sort the judge may do one of two things. He may sentence the defendant as an adult offender. That means that he would go through this process that we just mentioned, or he may say "I believe this boy shows promise of rehabilitation, and I would like to try the treatment on him by this Youth Correction Division."

In the event he turns that boy over to the Youth Correction Authority, that ends the judge's control over him. This was brought out yesterday. It is optional with him. He does not have to do it. But, if he does it, that ends the judge's connection with the case.

Statement of Hon. Carroll C. Hincks, United States District Judge for the District of Connecticut

[Pp. 74, 75] Title III. Youth Offenders (H.R. 2140)

Under existing law (as indeed under the proposed bill) a judge can, when he thinks it wise, admit a youth offender to probation under a suspended sentence. Thus without title III a judge has ample power to make a lenient disposition of a case.

And under existing law (as also under the proposed bill) the judge has ample power to sentence the youth offender as an adult and thus accomplish his confinement in a Federal reformatory or penitentiary where he will be in company with upward of a thousand other inmates, some as old as 30, or in a local jail housing the sewage of local humanity. Thus without title III, the judge has power to make a drastic disposition of a case.

But time and again it has been my distressing experience to have to deal with a youth offender deserving neither the lenient nor the drastic treatment which alone is now available. In this dilemma, and faced with the alterantive of a drastic treatment which I felt was neither deserved nor helpful, I have sometimes felt constrained to dispose of a case with a probationary term even when I believed firmer treatment desirable. And I might add that occasionally in such cases my forebodings have come to pass, and the youth offender, at large under probation, has again offended.

Against this background, I feel that title III of the act will be a godsend to the judge as providing an ideal disposition for the usual youth offender. Under its provisions, he will get needed discipline and training with a minimum exposure to contaminating influences, and will be returned to this normal environment under experienced supervision as soon as the state of his character development shall warrant.

Thus whatever title III may accomplish, certainly its effect will not be to coddle the youth offender. On the contrary, it will normally bring about his firmer treatment by removing the sentencing judge from the dilemma just referred to.

Reference Notes on the Federal Corrections Act (Submitted by James V. Bennett, Director, Bureau of Prisons)

[P. 140] The English Borstal System

The idea of such a youth authority is not new, either in theory or practice, in this country or abroad. For example, the system of Borstal institutions in England, a group of 10 training schools for older adolescents, 16 to 23, with a variety of treatment methods ranging from open institutions with a maximum of individual freedom and community participation to an institution of maximum security not unlike our reformatories for older offenders, has for 35 years operated with a classification and observation center under the supervision of trained workers. Youthful offenders for whom Borstal rather than probation or penal treatment is considered, are committed by the judge to the care of a board and sent to a central receiving station.

III. Federal Corrections Act

HEARINGS BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, 78TH CONGRESS, FIRST SESSION, ON S. 895

[Pp. 5–6] *Statement of Hon. John J. Parker, Senior Judge, United States Circuit Court for the Fourth District*

I think I should describe the system that we have worked out for the dealing with the offenders generally. We do not interfere with the judge's right to admit any convicted person to probation. We let the probation and the judge's power over the probation law stand exactly as it is.

[P. 24] *Statement of John R. Ellingston, Representing the American Law Institute, Philadelphia, Pa.*[7]

Mr. ELLINGSTON. In that connection, it should perhaps be emphasized, in a manner that Mr. Bennett may not feel free to do, that the Federal system has developed in its institutions a system of diagnostics in 30 institutions scattered throughout the country, meaning that every court would have relatively nearer at hand a center to which the individual would be committed for that initial study and that study is not just a psychiatric study. It is a month-long intimate contact with this individual. If it is properly done, it is a completely different approach from saying that some specialist, instead of a judge, is going to have an opinion. It is a matter of getting to know the whole background, the family life, the work habits, the education, as well as the psychic and physical condition of the individual before you make your decision.

That is why, for all age groups, of course, the courts retain the power of probation. Sometimes he will make mistakes but if he has an individual about whom he feels uncertain, he can feel with some security that he can turn him over to the youth authority or this board with the knowledge that he is going to be studied and the disposition is going to be what is best for the individual, with a knowledge that he cannot himself give that case as a judge.

[7] Special adviser to the youth authority program of the American Law Institute, which drafted the Model Youth Authority Act.

U.S. GOVERNMENT PRINTING OFFICE: 1960

No. 17035

United States Court of Appeals

for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

KENNETH EUGENE GIBBS,
RONALD CHARLES WACHS,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court Southern District of California, Southern Division

January, 1960, Grand Jury—Southern Division

UNITED STATES OF AMERICA, Plaintiff,

vs.

KENNETH EUGENE GIBBS, RONALD CHARLES WACHS, ROBERT EARL PARKIN, Defendants.

INDICTMENT

(U.S.C., Title 21, Sec. 176(a)-Illegal importation of marihuana)

The Grand Jury charges:

On or about March 4, 1960, in San Diego County, within the Southern Division of the Southern District of California, defendants Kenneth Eugene Gibbs, Ronald Charles Wachs, and Robert Earl Parkin, with intent to defraud the United States, did knowingly import and bring into the United States from a foreign country, namely, Mexico, approximately one-half pound of bulk marihuana contrary to law, in that said marihuana had not been presented for inspection, entered, and declared as provided by United States Code, Title 19, Sections 1461, 1484 and 1485.

A TRUE BILL

/s/ [Illegible]
Foreman,

/s/ LAUGHLIN E. WATERS,
United States Attorney,

[Endorsed] Filed Mar. 30, 1960.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: April 4, 1960, at San Diego, California.

Present: Hon. Jacob Weinberger, District Judge; Deputy Clerk: Hal H. Kennedy; Reporter: Malcolm E. Love; U. S. Attorney by Ass't. Atty: Elmer Enstrom, Jr.; Counsel for the Defendant: Howard Harris, for Gibbs and Wachs; Robert Beecroft, for Parkin.

Defendants present in custody.

Proceedings: Arraignment and Plea, each defendant.

The defendants are duly arraigned and each enter seperate pleas of Not Guilty as charged.

It is ordered that this case is referred to Judge Carter and continued until April 5, 1960, at 9:30 A.M. for Setting for Trial.

JOHN A. CHILDRESS, Clerk,
/s/ By HAL H. KENNEDY,
Deputy

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: April 5, 1960, at San Diego, California.

Present: Hon. James M. Carter, District Judge; Deputy Clerk: William W. Luddy; Reporter: John Swader; U. S. Attorney by Ass't Atty.: Paul Hofflund; Counsel for the Defendant: Howard Harris for Gibbs and Wachs, Robert Beecroft for Parkin.

Defendants present in custody.

Proceedings: Setting.

The defendant Parkin withdraws plea of Not Guilty, and now enters a plea of Guilty.

It is ordered cause is ref. to P/O for I/R, and contd. to 4/26/60, at 10 A.M. for hearing said report and for sentence.

As to Wachs and Gibbs, it is ordered cause is set for trial for 4/26/60 at 10 A.M.

JOHN A. CHILDRESS, Clerk,
/s/ By WILLIAM W. LUDDY,
Deputy

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: April 18, 1960, at San Diego, California.

Present: Hon. James M. Carter, District Judge; Deputy Clerk: William W. Luddy; Reporter: John Swader; U. S. Attorney by Ass't Atty.: Paul Hoffllund; Counsel for the defendant: Howard R. Harris.

Defendants present on Bond.

Proceedings: Change of Plea.

Defendants each withdraw former plea of Not Guilty, and each now enters a plea of Guilty.

It is ordered cause is ref. to P/O for I/R, and continued to May 16, 1960, at 2 P.M. for hearing said report, and for sentence.

It is ordered trial date of April 26 is vacated.

JOHN A. CHILDRESS, Clerk,
/s/ By WILLIAM W. LUDDY,
Deputy

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: May 16, 1960, at San Diego, California.

Present: Hon. James M. Carter, District Judge; Deputy Clerk: William W. Luddy; Reporter: John Swader; U. S. Attorney by Ass't Atty.: Elmer M. Enstrom, Jr.; Counsel for the Defendant: Howard R. Harris.

Defendants present on bond.

Proceedings: Hearing report P/O and Sentence.

Court finds defendant Gibbs is 20 years of age, and defendant Wachs is 19 years of age, and each a youth offender. Pur to U. S. C., Title 18, Section 5010 (a), imposition of sentence is suspended and defendants placed on probation for a period of 5 years on usual conditions, obey all laws, etc., comply P/O, etc., not use or associate with known users of or dealers in narcotics in any form, not enter Mexico, etc., and not associate with each other.

Attorney Enstrom moves to set aside Illegal sentence, and it is ordered said motion is denied.

It is ordered bond of each defendant is exonerated.

JOHN A. CHILDRESS, Clerk,

/s/ By WILLIAM W. LUDDY,

Deputy

In the United States District Court Southern District of California, Southern Division

In No. 29215—Criminal

UNITED STATES OF AMERICA,

vs.

KENNETH EUGENE GIBBS

JUDGMENT

On this 16th day of May, 1960, came the attorney for the government and the defendant appeared in person and by counsel, Howard R. Harris.

It Is Adjudged that the defendant has been convicted upon his plea of guilty of the offense of Illegal importation of marihuana, in violation of U. S. C., Title 21, Section 176(a), as charged in the Indictment in one count, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is twenty (20) years of age, and is a youth offender. Pursuant to U. S. C., Title 18, Section 5010 (a), imposition of sentence is suspended and defendant is placed on probation for a period of five years on condition that he obey all laws, Federal, State and Municipal, that he comply with all lawful rules and regulations of the Pro-

bation Department, that he not use or associate with known users of or dealers in any of the prohibitive pills, marihuana or narcotics in any form, that he not enter Mexico nor approach the Mexican Border without the express permission from the Probation Department, and that he not associate with co-defendant Ronald Charles Wachs.

It Is Adjudged bond of the defendant is exonerated.

/s/ JAMES M. CARTER,
United States District Judge.

[Endorsed]: Filed May 16, 1960.

In the United States District Court Southern District of California, Southern Division

IN No. 29215—CRIMINAL

UNITED STATES OF AMERICA,

vs.

RONALD CHARLES WACHS.

JUDGMENT

On this 16th day of May, 1960 came the attorney for the government and the defendant appeared in person and by counsel, Howard R. Harris.

It Is Adjudged that the defendant has been convicted upon his plea of guilty of the offense of illegal importation of marihuana, in violation of U. S. C., Title

21, Section 176(a), as charged in the Indictment in one count, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudge that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is nineteen (19) years of age, and is a youth offender. Pursuant to U. S. C., Title 18, Section 5010 (a) imposition of sentence is suspended and defendant is placed on probation for a period of five years on condition that he obey all laws, Federal, State and Municipal, that he comply with all lawful rules and regulations of the Probation Department, that he not use or associate with known users of or dealers in any of the prohibitive pills, marihuana or narcotics in any form, that he not enter Mexico nor approach the Mexican Border without the express permission from the Probation Department, and that he not associate with co-defendant Kenneth Eugene Gibbs.

It Is Adjudged that bond of the defendant is exonerated.

/s/ JAMES M. CARTER,
United States District Judge.

[Endorsed]: Filed May 16, 1960.

In the United States District Court Southern District of California, Southern Division

No. 29215-SD—Cr.

UNITED STATES OF AMERICA, Plaintiff,

vs.

KENNETH EUGENE GIBBS,
RONALD CHARLES WACHS, Defendants.

NOTICE OF MOTION TO CORRECT SENTENCES

To the Defendants and Attorney, Howard R. Harris, Esq.

Please take notice that on May 23, 1960, at 10:00 o'clock a.m. or as soon thereafter as the matter may be heard on the calendar of the Honorable James M. Carter, United States District Judge, in his courtroom, United States Customs House and Court House, San Diego, California, plaintiff, United States of America, will move to correct the sentences imposed by this Honorable Court on May 16, 1960.

Said motion will be supported by this notice, the motion to correct sentences, points and authorities, and records and papers on file herein.

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant U. S. Attorney,
Chief, Criminal Division.

/s/ ELMER ENSTROM, JR.,
Assistant U. S. Attorney,
Attorneys for Plaintiff,
United States of America.

[Title of District Court and Cause.]

MOTION TO CORRECT SENTENCES AND POINTS & AUTHORITIES IN SUPPORT THEREOF

Comes now the plaintiff, United States of America, and moves this Honorable Court to correct the sentences imposed by this Court on May 16, 1960, on the ground that the sentences thus imposed were below the mandatory minimum required to be imposed by Title 21, United States Code, Section 176(a).

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,
ROBERT JOHN JENSEN,
Assistant U. S. Attorney,
Chief, Criminal Division
/s/ ELMER ENSTROM, JR.,
Assistant U. S. Attorney,
Attorneys for Plaintiff,
United States of America.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed May 18, 1960.

[Title of District Court and Cause.]

POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO CORRECT SENTENCE

We refer the court to the opinion of the court dated May 30, 1959 in the case of U. S. vs. Smithson and Austin, No. 27584 and U. S. vs. Feaux, No. 28036 U. S. D. C. Dist. of Calif. So. Div.

We may add that the Narcotics Control Act of 1956 is no more "repugnant" or "in conflict" with the provisions of Section 5010 (a) Title 18 U. S. C., than they are to the subsequent provisions of Section 5010. Yet, the Department of Justice finds no repugnance or conflict with respect to the later sections.

It is submitted that the motion to correct the sentences should be denied.

/s/ HOWARD R. HARRIS,
Attorney for Defendants

[Endorsed]: Filed May 28, 1960.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: May 24, 1960, at San Diego, California.

Present: Hon. James M. Carter, District Judge; Deputy Clerk: William W. Luddy; Reporter: John Swader; U. S. Attorney by Ass't Atty.: Elmer M. Enstrom, Jr.; Counsel for the Defendant: Howard R. Harris.

Defendants not present.

Proceedings: Hearing government's motion to correct sentence.

Attorney Enstrom argues in support of motion.

It Is Ordered said motion is denied.

JOHN A. CHILDRESS, Clerk,
/s/ By WILLIAM W. LUDDY,
Deputy.

In the United States District Court Southern District of California, Southern Division

No. 29215-SD Cr.

UNITED STATES OF AMERICA, Plaintiff,

vs.

RONALD CHARLES WACHS, Defendant.

ORDER

The defendant, Ronald Charles Wachs, in the above-entitled cause having come before the Court on May 16, 1960, for sentence, the Court having found that the defendant was nineteen years of age and would benefit from treatment under the Youth Corrections Act, imposition of sentence having been suspended and the defendant placed on probation for a period of five years, pursuant to the provisions of Title 18, Section 5010(a) of United States Code, and plaintiff, United States of America, by its counsel, having moved the Court to correct the sentence as being below the mandatory minimum required to be imposed by Title 21, Section 176(a), United States Code, and the matter having come on for hearing this 24th day of May, 1960,

It Is Hereby Ordered that said motion by the United States is denied.

Done in open Court this 24th day of May, 1960.

/s/ JAMES M. CARTER,
United States District Judge

Presented by:

/s/ ELMER ENSTROM, JR.,
Assistant United States Attorney

Approved: Howard R. Harris, Atty. for Deft.

[Endorsed]: Filed May 24, 1960.

In the United States District Court Southern District of California, Southern Division

No. 29215-SD Cr.

UNITED STATES OF AMERICA, Plaintiff,

vs.

KENNETH EUGENE GIBBS, Defendant.

ORDER

The defendant, Kenneth Eugene Gibbs, in the above-entitled cause having come before the Court on May 16, 1960, for sentence, the Court having found that the defendant was twenty years of age and would benefit from treatment under the Youth Corrections Act, imposition of sentence having been suspended and the defendant placed on probation for a period of five years, pursuant to the provisions of Title 18, Section 5010(a) of United States Code, and plaintiff, United States of America, by its counsel, having moved the Court to correct the sentence as being below the mandatory minimum required to be imposed by Title 21, Section 176(a), United States Code, and the matter having come on for hearing this 24th day of May, 1960,

It Is Hereby Ordered that said motion by the United States is denied.

Done in open Court this 24th day of May, 1960.

/s/ JAMES M. CARTER,
United States District Judge.

Presented by:

/s/ ELMER ENSTROM, JR.,
Assistant United States Attorney.

Approved: Howard R. Harris, Atty. for Deft.

[Endorsed]: Filed May 24, 1960.

In the United States District Court Southern District of California, Southern Division

In No. 292-SD Cr.

UNITED STATES OF AMERICA, Plaintiff,

vs.

KENNETH EUGENE GIBBS, Defendant.

NOTICE OF APPEAL TO THE COURT OF APPEALS

Notice is hereby given that United States of America, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the judgment of conviction and order suspending imposition of sentence and placing defendant on probation, dated May 16, 1960, and entered May 20, 1960, and from the order denying motion of plaintiff to correct sentence dated May 24, 1960, and entered May 26, 1960.

LAUGHLIN E. WATERS,
United States Attorney,

/s/ ELMER ENSTROM, JR.,
Assistant United States Attorney

Dated: June 3, 1960, San Diego, California.

[Endorsed]: Filed June 3, 1960.

In the United States District Court Southern District of California, Southern Division

In No. 29215-SD Cr.

UNITED STATES OF AMERICA, Plaintiff,

vs.

RONALD CHARLES WACHS, Defendant.

NOTICE OF APPEAL TO THE COURT OF APPEALS

Notice is hereby given that United States of America, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the judgment of conviction and order suspending imposition of sentence and placing defendant on probation, dated May 16, 1960, and entered May 20, 1960, and from the order denying motion of plaintiff to correct sentence dated May 24, 1960, and entered May 26, 1960.

LAUGHLIN E. WATERS,
United States Attorney,

/s/ ELMER ENSTROM, JR.,
Assistant United States Attorney

Dated: June 3, 1960, San Diego, California.

[Endorsed]: Filed June 3, 1960.

In the United States District Court Southern District of California, Southern Division

In No. 29215-SD Cr.

UNITED STATES OF AMERICA, Plaintiff,

vs.

RONALD CHARLES WACHS, Defendant.

MOTION FOR EXTENSION OF TIME WITHIN WHICH TO FILE RECORD ON APPEAL.

Comes now the United States, by its attorneys, and respectfully moves this Court for an extension of time within which to file the record on appeal until September 1, 1960, ninety days from the date of filing the first notice of appeal, for the reasons hereinafter set forth.

The appeal in the case of United States v. Helen Mae Lane, No. 16874, Court of Appeals for the Ninth Circuit, and United States v. Honorable Fred Kunzel, Petition for a Writ of Mandamus, Court of Appeals for the Ninth Circuit, involves issues identical to those presented by the instant case, and a decision in Lane-Kunzel would probably also dispose of the instant appeal. Accordingly, both the United States and the defendant would save time, effort, and expense if action on this appeal were delayed until a decision is reached in Lane-Kunzel.

Wherefore, it is respectfully requested that the time for filing the record herein be extended to September 1, 1960.

/s/ LAUGHLIN E. WATERS,
United States Attorney

/s/ ELMER ENSTROM, JR.
Assistant United States Attorney

Dated: July 8, 1960.

[Endorsed]: Filed July 8, 1960.

In the United States District Court Southern District of California, Southern Division

In No. 29215-SD Cr.

UNITED STATES OF AMERICA, Plaintiff,

vs.

KENNETH EUGENE GIBBS, Defendant.

MOTION FOR EXTENSION OF TIME WITHIN WHICH TO FILE RECORD ON APPEAL

Comes now the United States, by its attorneys, and respectfully moves this Court for an extension of time within which to file the record on appeal until September 1, 1960, ninety days from the date of filing the first notice of appeal, for the reasons hereinafter set forth.

The appeal in the case of United States v. Helen Mae Lane, No. 16874, Court of Appeals for the Ninth Circuit, and United States v. Honorable Fred Kunzel, Petition for a Writ of Mandamus, Court of Appeals for the Ninth Circuit, involves issues identical to those presented by the instant case, and a decision in Lane-Kunzel would probably also dispose of the instant appeal. Accordingly, both the United States and the de-

fendant would save time, effort, and expense if action on this appeal were delayed until a decision is reached in Lane-Kunzel.

Wherefore, it is respectfully requested that the time for filing the record herein be extended to September 1, 1960.

/s/ LAUGHLIN E. WATERS,
United States Attorney

/s/ ELMER ENSTROM, JR.,
Assistant United States Attorney

Dated: July 8, 1960.

[Endorsed]: Filed July 8, 1960.

In the United States District Court Southern District of California, Southern Division

In No. 29215-SC Cr.

UNITED STATES OF AMERICA, Plaintiff,

vs.

KENNETH EUGENE GIBBS, Defendant.

ORDER

Upon consideration of the motion of the United States of America for an extension of time within which to file the record on appeal herein, good cause appearing therefor,

It Is Hereby Ordered: That the time for filing the record on appeal herein is extended to and including September 1, 1960.

Dated this 11th day of July, 1960.

/s/ JACOB WEINBERGER,
United States District Judge

[Endorsed]: Filed July 11, 1960.

In the United States District Court Southern District of California, Southern Division

In No. 29215-SD Cr.

UNITED STATES OF AMERICA, Plaintiff,

vs.

RONALD CHARLES WACHS, Defendant.

ORDER

Upon consideration of the motion of the United States of America for an extension of time within which to file the record on appeal herein, good cause appearing therefor,

It Is Hereby Ordered: That the time for filing the record on appeal herein is extended to an dincluding September 1, 1960.

Dated this 11th day of July, 1960.

/s/ JACOB WEINBERGER,
United States District Judge

[Endorsed]: Filed July 11, 1960.

In the United States District Court Southern District of California, Southern Division

No 2921-SD Cr.

UNITED STATES OF AMERICA, Plaintiff,

vs.

RONALD CHARLES WACHS and KENNETH EUGENE GIBBS, Defendants.

MOTION TO SET ASIDE ORDER EXTENDING TIME WITHIN WHICH TO DOCKET APPEAL

Defendants, Ronald Charles Wachs and Kenneth Eugene Gibbs respectfully move the above entitled Court may have to docket its appeal to September 1, 1960.

Notice of Appeal, by Appellant United States of America, was filed on June 3, 1960. Appellant has not proceeded, under Rule 75, Federal Rules of Civil Procedure, promptly to designate the portions of the record which it desires the Court of Appeals to consider with reference to the Appeal. The purpose of the extension was not to allow the Court Reporter or the Clerk to properly prepare the record. On the contrary, the purpose was merely delay.

The delay was for the purpose of preventing Appellees from being heard in this matter so important to their future well being.

The record itself consists merely of the Indictment, the Judgment of Conviction and the Order with respect to the sentence. Thus, the expense involved is minimal. Appellees desire the right to be heard in the Court of Appeals and failure in this request would be a denial

of due process. Appellees therefore ask the Court to set aside its order extending time within which Appellants may docket their appeal.

/s/ HOWARD R. HARRIS,
Attorney for Defendants

[Endorsed]: Filed July 13, 1960.

[Title of District Court and Cause.]

DECLARATION OF HOWARD R. HARRIS

I, Howard R. Harris, state:

That I am the Attorney of Record for defendants, Ronald Charles Wachs and Kenneth Eugene Gibbs. That the Court signed an Order Ex-Parte extending time within which to docket the appeal in the above matter. That concurrently herewith, appellee is filing a motion to set aside such order. That time is of the essence, in that a delay of time will destroy defendant's right to be heard on appeal in this matter.

That I am due to appear in the United States District Court, Southern District of California, Southern Division, on Tuesday, July 19, 1960, on a matter on which I was appointed. I believe it will save the time of the Court, as well as of Counsel, to hear the matters at the same time.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 13th day of July, at San Diego, California.

/s/ HOWARD R. HARRIS,
Attorney for Defendants

[Endorsed]: Filed July 13, 1960.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: July 20, 1960, at San Diego, California.

Present: Hon. James M. Carter, District Judge; Deputy Clerk: William W. Luddy; Reporter: John Swader; U. S. Attorney by Ass't Atty.: Elmer M. Enstrom, Jr.; Counsel for the defendant: Howard Harris.

Defendants not present.

Proceedings: Hearing defendants' motion to set aside order extending time within which to docket appeal.

Attorney Enstrom argues in opposition to said motion.

It Is Ordered said motion is granted, the order extending time to docket appeal to September 1, 1960, is modified and Government is granted to August 1, 1960 in which to docket record on appeal.

JOHN A. CHILDRESS, Clerk
By WILLIAM W. LUDDY,
Deputy

[Title of District Court and Cause.]

PRAECIPE TO CLERK, UNITED STATES DISTRICT COURT, RE DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Pursuant to the designation of contents of record on appeal under Rule 75 of the Federal Rules of Civil Procedure filed July 21, 1960, by Appellant United States of America, you are hereby requested to forward

said record to the Court of Appeals forthwith, making certain that the following are contained in the said record on appeal in the above-entitled matter:

1. The Indictment filed March 30, 1960.

2. Minutes of the United States District Court, including those dated as follows:

(a) Minutes dated April 4, 1960, regarding arraignment and plea of Kenneth Eugene Gibbs and Ronald Charles Wachs;

(b) Minutes dated April 5, 1960, regarding setting as to Kenneth Eugene Gibbs and Ronald Charles Wachs;

(c) Minutes dated April 18, 1960, regarding plea of guilty by Kenneth Eugene Gibbs and Ronald Charles Wachs;

(d) Minutes dated May 16, 1960, regarding judgment and order suspending imposition of sentence of Kenneth Eugene Gibbs and Ronald Charles Wachs.

(e) Minutes dated May 24, 1960, regarding hearing on motion of the United States to correct sentences.

3. The reporter's transcript of proceedings as to Kenneth Eugene Gibbs and Ronald Charles Wachs, Appellees, on the following date: May 16, 1960, re hearing regarding judgment and order suspending imposition of sentence of Kenneth Eugene Gibbs and Ronald Charles Wachs.

4. The judgments of conviction and orders suspending imposition of sentences and placing Kenneth Eugene Gibbs and Ronald Charles Wachs on probation, filed May 16, 1960.

5. The notice of motions of the United States to correct sentences as to Kenneth Eugene Gibbs and Ron-

ald Charles Wachs; Motion to correct sentences and points and authorities in support thereof, filed May 18, 1960.

6. The orders denying motion of the United States to correct sentences of Kenneth Eugene Gibbs and Ronald Charles Wachs filed May 24, 1960.

7. The notices of appeal of the United States as to Kenneth Eugene Gibbs and Ronald Charles Wachs, Appellees, filed June 3, 1960.

8. Orders extending time for Appellant to file record on appeal as to Kenneth Eugene Gibbs and Ronald Charles Wachs, Appellees, to and including September 1, 1960, filed July 11, 1960.

9. Minute order dated July 20, 1960, modifying orders filed July 11, 1960, to extent that the time for filing the record on appeal herein is extended to and including August 1, 1960, instead of September 1, 1960, as to Appellees, Kenneth Eugene Gibbs and Ronald Charles Wachs.

Dated: July 21, 1960.

LAUGHLIN E. WATERS,
United States Attorney

/s/ ELMER ENSTROM, JR.
Assistant United States Attorney

Affidavit of Service by Mail Attached.

[Endorsed]: Filed July 21, 1960.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the Clerk, United States District Court, Southern District of California:

Pursuant to Rule 75 of the Federal Rules of Civil Procedure, Appellant, United States of America, hereby designates that the complete record and all of the proceedings in the above cause as to Appelleees, Kenneth Eugene Gibbs and Ronald Charles Wachs, be contained in the record on appeal in the above matter.

Dated: July 21, 1960.

LAUGHLIN E. WATERS,
United States Attorney
/s/ ELMER ENSTROM, JR.
Assistant United States Attorney

Affidavit of Service by Mail Attached.

[Endorsed]: Filed July 21, 1960.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Dated: August 1, 1960, at San Diego, California.

Present: Hon. James M. Carter, District Judge; Deputy Clerk: William W. Luddy; Reporter: None Appearing; U. S. Attorney by Ass't Atty.: None Appearing; Counsel for the Defendant: None Appearing.

Defendants are not present.

Proceedings: It Is Ordered that time for Docketing Record on Appeal be, and it hereby is, extended for a period of five days from today.

JOHN A. CHILDRESS, Clerk
By WILLIAM W. LUDDY,
Deputy

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the foregoing documents together with the other items, all of which are listed below, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case; and that said items are the originals unless otherwise shown on this list:

PAGE:

1 Names and Addresses of Attorneys.
2 Indictment, filed 3/30/60.
3 Minute Order 4/4/60 re arraignment and plea of defendants.
4 Minute Order 4/5/60 re setting.
5 Minute Order 4/18/60 re change of plea.
6 Minute Order 5/16/60 re sentence.
7 Judgment for Kenneth Eugene Gibbs, filed 5/16/60.
8 Judgment for Ronald Charles Wachs, filed 5/16/60.
9 Plaintiff's Notice of Motion to Correct Sentences and Motion to correct sentences, etc., filed 5/18/60.
17 Defendants' Points and Authorities in opposition to motion to correct sentences, filed 5/28/60.
18 Minute Order 5/24/60 re hearing on motion to correct sentences.
19 Order denying motion to correct sentences as to Ronald Charles Wachs, filed 5/24/60.
20 Order denying motion to correct sentence as to Kenneth Eugene Gibbs, filed 5/24/60.
21 Notice of Appeal filed 6/3/60 by Plaintiff from judgment as to Kenneth Eugene Gibbs.

22 Notice of Appeal filed 6/3/60 by Plaintiff from judgment as to Ronald Charles Wachs.

23 Plaintiff's motion for extension of time within which to file record on appeal, filed 7/8/60 (2 motions).

27 Order extending time to file and docket record on appeal, filed 7/11/60 (2 orders).

29 Motion to set aside order extending time within which to docket appeal, filed 7/13/60.

31 Declaration of Howard R. Harris, filed 7/13/60.

32 (copy) Minute Order 7/20/60 re hearing on motion to set aside order extending time to docket appeal.

33 Praecipe to Clerk, re Designation of contents of record on appeal, filed 7/21/60.

36 Designation of contents of record on appeal, filed 7/21/60.

38 (copy) Minute Order 8/1/60 extending time to docket record on appeal period of five days from date.

(Copy) One volume Reporter's Transcript of Proceedings had on: May 16, 1960.

Dated: August 4, 1960.

[Seal]

JOHN A. CHILDRESS,
Clerk

/s/ BY WM. A. WHITE,
Deputy Clerk.

In the United States District Court Southern District of California, Southern Division

No. 29215-SD-C

UNITED STATES OF AMERICA, Plaintiff,

vs.

KENNETH EUGENE GIBBS and RONALD CHARLES WACHS, Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

San Diego, California
May 16, 1960

Before Honorable James M. Carter, Judge Presiding

Appearances: For the Plaintiff: Elmer M. Enstrom, Jr., Esq., Assistant United States Attorney;

For the Defendant: Howard R. Harris, Esq., [1]*

Monday, May 16, 1960, 2:00 P.M.

(Other Matters)

The Clerk: 24-29215 Criminal, United States of America, Plaintiff, v. Kenneth Eugene Gibbs and Ronald Charles Wachs, Defendants.

Hearing Report of Probation Officer and sentence.

The Court: Have you seen the Probation Report, Mr. Harris?

Mr. Harris: Yes, I have, your Honor.

The Court: Does the Government have a recommendation in these cases?

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* Page numbers appearing at bottom of page of Original Transcript of Record.

Mr. Enstrom: We concur in the Probation Officers Reports.

The Court: Mr. Harris, what do you or the defendants have to say before sentence is imposed?

Mr. Harris: Your Honor, first I would like to talk about Ron Wachs, who is standing next to me. Ron is from Paso Robles, California. His family has lived there all his life. Mr. and Mrs. Wachs are in Court. They are what we would consider a good family. Ron was graduated from High School. He has never been in any trouble. He is not known to the Police up there as running in any Juvenile Gang or as a person whom they have suspected for a long time but just haven't caught. Ron's sister is going to the University of California and is a Senior, and his younger sister is married and is working for the Phone Company.

Yet Ron got into this trouble, whatever the reason. I [2] think he was frank with the Probation Officer. He told them what had happened. He told them that he had fooled around with marihuana before.

That is the situation with Ron Wachs.

Ken Gibbs is the red-headed young man standing on the outside here. His situation was a little different, from his back-ground. His grandmother, Mrs. Macy, has raised him, and she is present here. His older brother is in Service. Ken, of course, didn't have a mother and father to watch out for him, but his grandmother has done the job. He hasn't been in any real trouble until this time. He did not finish his Senior year in High School. Other than this present trouble he has kept his nose clean. He also was not known to the Police up in Paso Robles.

These boys have gotten into this trouble now with respect to marihuana. It is the old business of coming down to Tijuana, buying some marihuana from a taxi-driver, and getting caught with it at the border.

I may say about Kenn Gibbs that he has been employed and that his employers all had a good word to say about him. If he would be sentenced under Section 5010(a) he would be able to get a job in the Paso Robles area as a Clerk or in other ways. He has worked previously. He has inquired of his prior boss, and his boss appears willing to take him back.

Ron Wachs has worked on his father's farm. He has done [3] farm work. He has run tractors and done minor repairs on tractors and other work of that nature, and he has a job if he would be sentenced under Section 5010(a).

I may mention that within the last week—I just learned about it today—Ron Wachs married his girl-friend up in the Paso Robles area. As I say this is something very current and just happened during the last week. So now he has added responsibilities.

I know that the Department of Justice does not believe that the Court has the jurisdiction to grant sentence under Section 5010(a), under this type of charge. However, I know that the Court has done it in the past and might consider it in the future in the appropriate case. I submit to your Honor that this appears to be a proper or appropriate case. These aren't boys who have been continually in trouble or have been on the edge of the law for years and years—I say years and years, speaking comparatively—for 2, 3 or 4 years, since they have been in the position where they could

get in trouble. These are boys who evidently got into some bad company. They have certainly learned their lesson, and I think that in this case, institutional treatment is not needed. I ask the Court to sentence them under Section 5010(a).

Mr. Enstrom: Your Honor, the Government stated that it concurred in the recommendation of the Probation Officer. It was, of course, with the understanding that the recommendation [4] was that the defendants be sentenced under Section 5010(b). We, of course, oppose a sentence under Section 5010(a) on the ground that such sentence would be an illegal sentence.

The Court: What happened to the Parkin case?

Mr. Enstrom: That defendant was sentenced under Section 5010(a), your Honor.

The Court: Did I sentence him, or did Judge Weinberger?

Mr. Enstrom: You sentenced him, according to my records, on April 29th.

The Court: How old was he?

Mr. Harris: I think he was 21, and there was some evidence of prior narcotic activity as far as he was concerned, that is my understanding.

The Court: What ever I do, it is probably a good thing that these boys were arrested when they were, because they started on the primrose path that leads to addiction to heroin. They start with pills, and then graduate to marihuana, and then to heroin, and then you're really hooked.

I am of the view that the Court has authority under Section 5010(a) to place a Youth Offender under the age of 21 on Probation. I think with these boys' prior records such a sentence is indicated.

As I understand the Act, though, you get only one bite at the apple. That is, you get only one bite at the Youth Corrections Act. If you violate Probation, then you are [5] sentenced as an adult and get from 5 to 20 years. Whereas, if you are sentenced at this time under sub-division (b) you would get an indeterminate sentence which could not run more than 4 years incarceration.

Are you willing to take that gamble? If you violate Probation and come back here, then you get 5 to 20 years and you can't talk about being a Youth Offender any more. You get only one chance at the Act.

The Court sentences under Section 5010(a). It is the judgment of the Court as to each defendant that imposition of sentence is suspended and each defendant is placed on Probation under Section 5010(a).

The conditions of Probation are that defendants obey local, State and Federal law; that they comply with the Regulations of the Probation Department; that they not use any of the prohibited pills, marihuana or heroin; that they not associate with persons who are addicted to or use any of these substances or deal in them; that they not associate with one another; and that they not go to Mexico or anywhere near the Mexican border without express permission of their Probation Officer. The period of Probation is 5 years.

Mr. Enstrom: At this time, your Honor, I move for the record to set aside the sentence as to each defendant, under the Federal Rules, on the ground that it is an illegal sentence.

The Court: Motion denied. [6]

Mr. Harris: May bond be exonerated, your Honor?

The Court: Bond will be exonerated.

I want to see the defendants with their parents after Court.

The sentence will also contain a finding that defendant Wachs is 19 years of age and that defendant Gibbs is 20 years of age, and that they are both suitable for treatment under the Youth Corrections Act.

(Other matters.) [7]

[Certificate of Court Reporter attached.]

[Endorsed]: Filed July 29, 1960.

[Endorsed]: No. 17035. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Kenneth Eugene Gibbs, Ronald Charles Wachs, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed: August 5, 1960.

Docketed: August 10, 1960.

/s/ FRANK H. SCHMID,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In The United States Court of Appeals
for the Ninth Circuit

No. 17035

UNITED STATES, Appellant,

vs.

KENNETH EUGENE GIBBS and RONALD CHARLES WACHS, Appellees.

STATEMENT OF POINTS ON APPEAL

Comes now the United States by its attorneys and states that the following points will be urged in support of this appeal:

1. Jurisdiction of this appeal in this Court is sought under 28 U.S.C. 1291. United States v. Cook, 19 F. 2d 826 (5th Cir., 1927), aff'd. sub nom, United States v. Murray, 275 U.S. 347 (1928); United States v. Albrecht, 25 F. 2d 93 (7th Cir., 1928); United States v. La Shagway, 95 F. 2d 200 (9th Cir., 1938).

2. Appellees were convicted of a violation of 21 U.S.C. 176(a), and placed on probation. Under 26 U.S.C. 7237(d) the Court had no power to grant probation to a defendant convicted of a violation of 21 U.S.C. 176(a).

3. Offenders between the ages of 18 and 22 are not exempt from the prohibition of 26 U.S.C. 7237(d).

4. The Youth Corrections Division of the Bureau of Prisons is not authorized to supervise probation. It was created for the purpose of administering other types of treatment.

5. No grant of probation is authorized by the Youth Corrections Act (18 U.S.C. 5010(a)). The only probation available to youth offenders is that under 18 U.S.C. 3651, and the provisions of that section do not apply where 26 U.S.C. 7237(d) prohbits the grant of probation.

6. Even if the Youth Corrections Act provided the courts with power to place a defendant on probation, such power did not survive the enactment of 26 U.S.C. 7237(d).

7. The legislative histories of both the Narcotics Act and the Youth Corrections Act compel the conclusion that probation could not be granted to the defendants in this case and that the action of the District Court granting probation was unauthorized and illegal.

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant United States Attorney,
Chief, Criminal Division

/s/ ELMER ENSTROM, JR.,
Assistant United States Attorney

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Aug. 20, 1960. Frank H. Schmid, Clerk.

No. 17037

United States
COURT OF APPEALS
for the Ninth Circuit

BUILDING SYNDICATE CO.,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

HONORABLE JOHN F. KILKENNY, Judge.

THOMAS B. STOEL,
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No. 17037

United States
COURT OF APPEALS
for the Ninth Circuit

BUILDING SYNDICATE CO.,
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v.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

HONORABLE JOHN F. KILKENNY, Judge.

JURISDICTIONAL STATEMENT

This action originated in the United States District Court for the District of Oregon. The jurisdiction of that court was based on Title 28 U.S.C. Section 1346, Judiciary and Judicial Procedure. The action was brought by appellant, plaintiff below, against the United States to recover federal income tax for the year 1953 erroneously collected under the internal revenue laws. Appellant is an Oregon corporation and filed its federal income tax

return for the calendar year 1953 with the District Director of Internal Revenue, Portland, Oregon.

This court has jurisdiction of the appeal under Title 28 U.S.C. Section 1291, Judiciary and Judicial Procedure.

STATEMENT OF THE CASE

The complaint in the District Court sought recovery from appellee, defendant below, of $23,669.38 representing the portion of appellant's claim for refund of federal income tax for 1953 which had been rejected by the District Director of Internal Revenue.

Statement of the Facts

This case was tried below upon the facts stipulated in the pretrial order (R. 3-23), the oral testimony of three witnesses, and the exhibits introduced at the trial. The pretrial order lists the exhibits introduced by each of the parties.

A summary statement of the facts is as follows: In the spring of 1927 the real property then known as the "Northwestern Bank Building" property was owned by the Northwestern National Bank of Portland (Oregon), hereinafter called "Northwestern" (R. 4). Prior to June 21, 1927, Northwestern placed this property in the hands of George N. Black, a real estate broker, for purposes of sale (R. 4). Also prior to June 21, 1927, Mr. Black entered into negotiations with George W. York & Company, Inc., Cleveland, Ohio, hereinafter called "York," relative to financing the sale of the property (R. 4). These

negotiations culminated in a commitment by York dated June 21, 1927, to purchase an issue of land trust certificates representing the equitable ownership in the Northwestern Bank Building property at a price of $1,250,000 net (R. 4, Ex. 1). Subsequent to June 21, 1927, York associated with it the Union Trust Company of Cleveland, hereinafter called "Union," for the purpose of carrying out its commitment (R. 5).

Mr. Black had interested Harry C. Kendall, then Vice President of Lumbermens Trust Company, in the possibilities of the Northwestern Bank Building property, and Mr. Kendall, in turn, had interested a group of Portland investors who on August 1, 1927, organized Building Syndicate, an Oregon corporation, hereinafter called "Syndicate," and subscribed for $300,000 of its stock (R. 68, 70, 71, 73). Mr. Black, who had an option to buy the property for $2,200,000, assigned this option to Syndicate (Ex. 19, 20, R. 74).

Mr. Kendall and his coinvestors in Syndicate recognized that with capital of $300,000 they could not hope to acquire ownership of the property through first and second mortgage financing (R. 107). They believed that they would have an attractive investment if Syndicate could obtain a long-term leasehold on the property plus an option to purchase (R. 74) and that this could be done by having a trustee for land trust certificate holders acquire the property and give a long-term leasehold to Syndicate (R. 104, 107). Syndicate would raise additional moneys to acquire the leasehold by issuing through Lumbermens Trust Company first mortgage leasehold bonds (R. 107, 108, Ex. 8).

The acquisition of the property in the name of Security Savings & Trust Company (Portland, Oregon), hereinafter called "Security," which was the cotrustee of Union, was closed through an escrow on September 30, 1927 (R. 5, 6). In the closing Northwestern conveyed the property to Security; Security and Union as cotrustees executed an agreement and declaration of trust between themselves and "The Holders of Land Trust Certificates of Equitable Ownership in the Northwestern Building Site Located in Portland, Oregon, Leased to Building Syndicate (an Oregon corporation)" (R. 5, 6, Exs. 4, 6). Security leased to Syndicate the property involved for a period of 99 years, and Syndicate entered into an indenture with Lumbermens Trust Company to secure an issue of $750,000 first leasehold bonds (R. 5, 6, Exs. 7, 8). Payment to the seller for the property and delivery of the above-described documents were effected in a single escrow transaction on September 30, 1927 (R. 6).

The sources of the funds for payment of $2,202,-133.07 to the seller by the trustee were as follows (R. 6):

From trustee for Land Trust Certificate holders (proceeds of sale of 1,350 Land Trust Certificates of Equitable Ownership	$1,250,000.00
From Building Syndicate (proceeds of sale of leasehold bonds and of stock)	952,133.07
	$2,202,133.07

In 1928 the name of the property was changed to American Bank Building (R. 7). In 1932 the leasehold

bonds of Syndicate went into default and a bondholders' committee was organized (R. 7). In 1943, the leasehold bonds being still in default, the trustee for the bondholders acquired Syndicate's assets on December 31 of that year (R. 7). On November 9, 1944, a new corporation known as Building Syndicate Co., the appellant herein, hereinafter called "New Company," was organized (R. 7). The assets of Syndicate, including its lease on the bank property, were transferred to New Company on December 31, 1944, the acquisition of the assets by the trustee and their transfer to New Company being a tax-free reorganization under the Internal Revenue Code (R. 7).

On their federal income tax returns from 1927 through 1944 Syndicate and New Company mistakenly claimed depreciation deductions on the bank building each year on the basis of the remaining life of the building (assumed in 1927 to be 36 years) rather than amortizing the cost of the 99-year leasehold which they held (R. 9). On its tax return for the year 1945, New Company claimed depreciation from January 1, 1945, on the new allocated cost of the building based on an assumed life of 32 years from that date (R. 9, 10). Under these methods Syndicate and New Company had claimed deductions through October 31, 1945, aggregating $549,215.08 (R. 10). Computed on the basis of amortization over a 99-year life, the aggregate amortization of New Company's leasehold as of October 31, 1945, was $172,272.65 (R. 10). The excess of the deductions taken over leasehold amortization was $376,942.43; of this excess $274,784.49 did not result in tax benefit (R. 10).

The lease held by Syndicate and New Company contained an option to purchase the fee interest of the property from the lessor upon written notice (R. 8). New Company exercised this option to purchase on October 31, 1945. After exercising the option, New Company set up on its books as the basis of the land and building the unamortized balance of the leasehold estate per books at December 31, 1944, plus the amount paid on exercise of the option, and this total was allocated between land and building (R. 8, 9). Under this method the total cost of the property was shown on New Company's books in the amount of $1,842,-023.14 and this was allocated as follows (R. 8, 9):

Land	$ 817,027.29
Building, less Dunham System, elevators, and alterations	1,000,779.96
Dunham System, elevators, and alterations	19,591.33
Leasehold, Parcel B (unamortized)	4,624.56
	$1,842,023.14

On its tax return for the year 1945 and thereafter, New Company claimed depreciation on the basis of the amount so allocated to the building. The Commissioner of Internal Revenue disallowed so much of the depreciation claimed on New Company's 1953 return as was based on the portion of the 1945 option payment allocated to building. New Company paid the resulting deficiency and interest ($23,669.38) and following denial of its claim for refund brought this suit.

Question Involved

The question involved is that set forth as Issue 1 of the pretrial order (R. 11). It may be stated as follows:

Should the amount paid by New Company in 1945 to exercise its option to purchase the American Bank Building property be taken into account in computing New Company's basis for depreciation of the property?

Appellant is not raising in this appeal Issue 2 of the pretrial order (R. 11) with respect to which appellant contended in the court below that amounts claimed by it and Syndicate as deductions on the American Bank Building in excess of amortization on its leasehold cost (to the extent that such excess resulted in no tax benefit) should not be applied to reduce appellant's basis for the property (Plf.'s Contention 5, Pretrial Order, R. 12).

SPECIFICATIONS OF ERROR

1. The District Court erred in stating Findings of Fact Nos. 2, 19, 20, and 21 as findings of fact, since they are actually conclusions of law (R. 38, 39).

2. The District Court erred in stating in the second sentence of Finding of Fact No. 12 (R. 37) that—

> "The annual accounting reports, prepared by independent accountants, consistently showed that Building Syndicate regarded itself as the owner of the bank building,"

and in failing to find that the report of the independent accountants for the year 1938 (Ex. 52-N) was changed

at the request of the trustee to reflect ownership by Syndicate of a leasehold and that this method of presentation was continued in reports for later years (Exs. 52-O, P).

3. The District Court erred in concluding that Syndicate was the owner of the building for income tax purposes during the years 1927 through 1943 and that it properly computed depreciation on the total purchase price of the building (Finding of Fact No. 20, R. 39).

4. The District Court erred in concluding that the retirement of the land trust certificates was equivalent to refinancing a loan and had no effect on the basis of the property (Finding of Fact No. 19, R. 38) and that New Company's basis for depreciation is the same as that of its predecessor (Finding of Fact No. 21, R. 39).

5. The District Court erred in concluding that the lease and declaration of trust show that all parties regarded Syndicate as the owner of the building (Conclusion of Law No. 3, R. 39), since those documents conclusively establish that its interest was a leasehold with an option to purchase.

6. The District Court erred in making Finding of Fact No. 21 (R. 39) that the basis for depreciation in New Company was the same as it was in Syndicate.

7. The District Court erred in concluding that Syndicate was the owner of the building during the years in question (Conclusion of Law No. 4, R. 39), since its only interest in the building was a leasehold with an option to purchase.

8. The District Court erred in concluding that this case is controlled by the decision in *Helvering v. F. & R. Lazarus & Company,* 308 U.S. 252, 60 S. Ct. 209 (1939) (Opinion, R. 30, 31).

9. The District Court erred in concluding that appellant failed in its burden of proof (Conclusion of Law No. 2, R. 39).

10. The District Court erred in failing to hold as a matter of law that neither New Company nor Syndicate made any investment in the building prior to exercise of the option to purchase in 1945.

11. The District Court erred in failing to hold that the first capital investment in the building by either New Company or Syndicate was made when New Company exercised its option to purchase in 1945.

12. The District Court erred in failing to hold that after exercising its option to purchase in 1945 New Company properly added the option price to the net leasehold estate (computed after reduction by the amount of depreciation previously claimed) and allocated this sum between land and building and that the sum so allocated to the building became New Company's depreciation base for the building.

SUMMARY OF ARGUMENT

1. The District Court erred in failing to apply to this case the property law rule adopted in all of the land trust income tax cases.

2. Both property law and income tax cases apply the doctrine that a deed will not be treated as a mortgage unless both parties intended it as security.

3. The record affirmatively shows that Union intended that the land trust transaction involving the Northwestern Bank Building should create a lessor-lessee relationship and not a mortgagee-mortgagor relationship.

4. Instead of destroying appellant's position as the District Court thought, the Supreme Court decision in *Helvering v. F. & R. Lazarus & Company,* 308 U.S. 252, 60 S. Ct. 209 (1939), states the basic law which appellant believes is controlling in this case and which requires a holding for appellant.

5. The double tax benefit theory set forth in *The Akron Dry Goods Company,* 18 T.C. 1143 (1952), *aff'd per curiam,* 218 F. 2d 290 (6th Cir. 1954), has no application to this case since a decision for appellant cannot result in a double tax benefit.

6. The agreement determining the tax liability of Syndicate for 1927 has no effect for subsequent years.

ARGUMENT

I

Introduction

Appellant recognizes that under Rule 52(a) of the Rules of Civil Procedure for the United States District Court, the trial court's findings of fact are to control unless they are clearly erroneous. Except for the findings described in the Specifications of Error (Findings Nos. 2, 19, 20, and 21) as being actually conclusions of law and Finding No. 12 described in the Specifications of Error as inconsistent with certain of the exhibits, appellant does not challenge the findings.

The District Court's opinion states the issue in the case to be—

> "Whether Syndicate properly claimed and was allowed an income tax deduction for depreciation on the American Bank Building (formerly Northwestern Bank Building) during the years 1927 through 1943 computed on the basis of the total purchase price paid to the original vendors of the property."

It goes on to say that—

> "The answer to the question is solved by determining whether Syndicate, during such years, should be treated as the owner, for tax purposes, of the building in question."

In its conclusional Finding of Fact No. 20, the lower court then sets forth its answer, namely, that—

> "During the years 1927 through 1943, Building Syndicate, for income tax purposes, was the owner of the property in question."

Appellant accepts the District Court's statement of the issue as quoted above. But as a matter of law the court has fallen into error, first, in its view that the answer is to be found by determining whether Syndicate should be treated as the owner of the building *for tax purposes,* and, second, in its conclusion in Finding No. 20 that Syndicate was the owner *for income tax purposes.*

II

An analysis of the District Court's opinion reveals the reasoning which led it into error as a matter of law.

The test applied in all of the land trust cases involving the deduction by a lessee of depreciation on a building on the leased premises is whether the lessee has a capital investment in the building. This question is answered by applying property law concepts to determine whether the lessee had the rights of an owner-mortgagor or held a leasehold estate. See *Helvering v. F. & R. Lazarus & Company,* 308 U.S. 252, 60 S. Ct. 209 (1939); *City National Bank Building Company v. Helvering,* 98 F.2d 216 (D.C. Cir. 1938); *Commissioner v. H. F. Neighbors Realty Company,* 81 F.2d 173 (6th Cir. 1936); *The Akron Dry Goods Company,* 18 T.C. 1143 (1952), *aff'd per curiam,* 218 F.2d 290 (6th Cir. 1954).

The District Court in this case applied a different test of its own devising. It asserted that it was not necessary for the government to contend that the land trust transaction here involved created a mortgage with Syndicate as the owner-mortgagor and Union as the

mortgagee (R. 31). Its opinion indicates that it believed the established rules of property law to be inapplicable and that under some independent "tax purpose" concept Syndicate could be held to be the "owner for tax purposes" and so entitled to deduct depreciation. It repeatedly stated that Syndicate should be treated as the owner "for tax purposes" (R. 27) or "for all tax purposes" (R. 30) or "for income tax purposes" (R. 39).

Having adopted this new concept as its test of ownership, the court gave two principal reasons for finding its test satisfied: (1) because Syndicate's treatment of the transaction on its tax returns and accounting records showed that it regarded itself as the owner, it should therefore be treated as the owner *for tax purposes* (R. 27, 28) and (2) if Syndicate were not treated as the owner, a double tax benefit would be allowed (R. 32). While the court at some points in its opinion purported to consider the intent of the parties and states that "all parties . . . regarded Syndicate, not the trustees, as the real owner of the building" (R. 29), it nowhere analyzed the evidence *under property law tests for determining ownership.*

As to the first of the District Court's reasons listed above, appellant will show that whether a lessee is the owner of property so as to be entitled to take depreciation deductions depends on whether, under property law concepts, it, in fact, has a capital investment in the property and not on its unilateral representations in its tax returns and reports. As to the second of the court's reasons, it is apparent that the court did not understand

that in the computation of its claimed basis for the property, appellant has reduced the original cost of the leasehold by the prior depreciation deductions erroneously taken. Thus, it is not claiming as a part of its basis for the building the basis recovered through prior depreciation deductions—even those taken without tax benefit.

III

A series of cases involving land trust transactions have settled the principles of law to be applied in this case.

Having traced the lower court's reasoning and analyzed what appellant believes to be the principal errors in its reasoning, we turn now to the rules of law which control this case. They can be summarily stated:

(1) It will be recalled that appellant agrees with the lower court that the issue in the case is whether Syndicate properly claimed depreciation on the American Bank Building from 1927 to 1943. It is clear that the answer to this question turns on whether Syndicate had a capital investment in the building. The rule is well established that the statutory allowance for depreciation is available only to taxpayers (including lessees) who can show that they have a depreciating capital investment in the property. *Weiss v. Wiener,* 279 U.S. 333, 49 S. Ct. 337 (1929); *Dab v. Commissioner,* 255 F.2d 788 (2d Cir. 1958); *Atlantic Coast Line Railroad Company v. Commissioner,* 81 F.2d 309 (4th Cir. 1936).

(2) A lessee in a land trust transaction will be found to have a capital investment in the building only if,

under property law tests, it clearly appears that the lessee is the equitable owner of the property as a mortgagor rather than the holder of a leasehold estate. *Helvering v. F. & R. Lazarus & Company,* 308 U.S. 252, 60 S. Ct. 209 (1939); *City National Bank Building Company v. Helvering,* 98 F.2d 216 (D.C. Cir. 1938); *Commissioner v. H. F. Neighbors Realty Company,* 81 F.2d 173 (6th Cir. 1936); *The Akron Dry Goods Company,* 18 T.C. 1143 (1952), *aff'd per curiam,* 218 F.2d 290 (6th Cir. 1954).

(3) In all of the land trust cases, the basic documents (the deed to the trustee, the trust agreement for the benefit of the land trust certificate holders, and the lease to the lessee) purport to create a lessor-lessee relationship. However, under the equitable doctrine of property law that a deed absolute on its face will be held a mortgage if both parties so intended, a lessee may in a proper case be held to occupy the position of an owner-mortgagor. *Helvering v. F. & R. Lazarus & Company,* 308 U.S. 252, 60 S. Ct. 209 (1939); *City National Bank Building Company v. Helvering,* 98 F.2d 216 (D.C. Cir. 1938); *Commissioner v. H. F. Neighbors Realty Company,* 81 F.2d 173 (6th Cir. 1936); *The Akron Dry Goods Company,* 18 T.C. 1143 (1952), *aff'd per curiam,* 218 F.2d 290 (6th Cir. 1954).

IV

There is no conflict in the land trust tax cases as to the applicable law. The divergent results flow from significant factual distinctions.

In the application of the rules summarized above, the courts in some instances have held that the arrangement by which the trustee for land trust certificate holders took legal title to property and granted a leasehold estate to the lessee made the lessee the equitable owner of the entire property with the trustee holding only a security interest. In these cases the lessee as owner of a mortgagor's equity of redemption was found entitled to recover through depreciation deductions the entire capital investment in a building on the leased premises. See *Helvering v. F. & R. Lazarus & Company,* 308 U.S. 252, 60 S. Ct. 209 (1939); *Commissioner v. H. F. Neighbors Realty Company,* 81 F.2d 173 (6th Cir. 1936).

On the other hand, where the land trust-lease arrangement was found to give the lessee only a leasehold estate and no equitable ownership as a mortgagor, then it had no capital investment in the property entitling it to depreciation deductions. *City National Bank Building Company v. Helvering,* 98 F.2d 216 (D.C. Cir. 1938); *The Akron Dry Goods Company,* 18 T.C. 1143 (1952), *aff'd per curiam,* 218 F.2d 290 (6th Cir. 1954).

All of these cases recognize the doctrine of property law that "a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money." *Helvering v. F. & R. Lazarus &*

Company, 308 U.S. 252, 255, 60 S. Ct. 209, 210 (1939), quoting from *Peugh v. Davis,* 96 U.S. 332, 336 (1877). In the application of that doctrine they also rely upon the principle that a deed will be construed as a mortgage only if both the parties so intended. That principle and its application to this case are discussed below.

(a) Both property law and income tax cases apply the rule that a deed will not be treated as a mortgage unless both parties intended it as security.

It is fundamental that before a deed absolute on its face will be declared a mortgage, it must be proved that the parties intended the deed only as security. The intention of the parties at the time of the transaction is determinative. *Colahan v. Smyth,* 159 Or. 569, 575, 81 P.2d 112, 115 (1938). Since the documents are presumed to create the relationship they purport to create, it is only when the evidence shows clearly that the parties intended a mortgagor-mortgagee relationship to exist that a court will find the presumption overcome. *Coyle v. Davis,* 116 U.S. 108, 112, 6 S. Ct. 314 (1885); *Rogers v. Burt,* 157 Ala. 91, 47 So. 226 (1908). And to be operative, the intent of the parties must be mutual. The unilateral intent of one party is ineffective. *Cousins v. Crawford,* 258 Ala. 590, 63 So. 2d 670, 677 (1953); *Saxton v. Campbell,* 210 Minn. 29, 297 N.W. 348, 349 (1941); *Glasgow v. Andrews,* 129 Cal. App. 2d 660, 277 P.2d 400 (Dist. Ct. App. 1954).

The two lines of income tax cases in the land trust field, described above, supra p. 16, both apply these

property law principles. However, on the basis of the fact situations involved in the *Lazarus* and *Neighbors* cases (including direct testimony by representatives of the lessee or by representatives of both the lessee and the trustee), the courts there held that the transactions were intended to be mortgages. On the other hand, on the basis of somewhat different facts in the *City National and Akron* cases and in the absence of such testimony by the parties, the court found that the lessees were intended to receive what the documents purported to give them, that is, a leasehold.

(b) The parties to the present transaction intended that the land trust arrangement should give Syndicate a leasehold and not equitable ownership as a mortgagor.

In the present case both Mr. Kendall, who participated in the original transaction on behalf of Syndicate, and Mr. Coney, who represented Union, testified that the transaction was intended to be exactly what the documents show it to have been, an absolute sale of the building by Northwestern Bank to the trustee with a lease-option to Syndicate. No loan was ever even considered. Nor was it ever considered that the trustee was taking title only as security (R. 77, 78, 104, 118, 119, 120).

The District Court dismisses this testimony on the grounds that it is inconsistent with Syndicate's minutes, tax returns, and accounting records and with what the District Court regards as a proper construction of the lease and declaration of trust. However, viewed in the

whole context of the transaction, there are logical explanations for the alleged inconsistencies.

Syndicate was formed by a group of Portland businessmen who believed that through the land trust device they could acquire an interest in the Northwestern Bank property with a minimum investment on their part. They knew that with $300,000 of equity money they could not hope to float first and second mortgages and acquire ownership of the property. But they realized that by joining with the land trust certificate holders who would take the fee, they could finance the acquisition of a long-term leasehold using that leasehold as the security for issuance of first mortgage leasehold bonds. Thus put in possession of the property under a lease containing an option to purchase, they could see the possibility that they might ultimately acquire the entire interest in the premises if their expectations as to the earning power of the building materialized (R. 74).

The Northwestern Bank transaction marked the first use of land trust certificates in Oregon so that it was an unfamiliar device to Oregon investors (R. 113). Since Syndicate became the lessee under a long-term net lease with a purchase option—entitled to all the income and assuming all the expenses of the building—it is not surprising that Syndicate's directors thought of their corporation in laymen's terms as the "owner." And in light of the unsettled state of the income tax law on the point, Syndicate's mistake in claiming depreciation deductions on its tax returns as the "owner" of the build-

ing is equally understandable. Syndicate acquired its leasehold in 1927. The question whether a long-term lessee under a land trust arrangement could claim depreciation was subject to considerable confusion as late as the Supreme Court decision in the *Lazarus* case in 1939. See also *The Minneapolis Security Building Corporation,* 38 B.T.A. 1220 (1938).

In any event, it is clear that Syndicate's records are not evidence of the intent of the trustee and cannot affect the lessor-lessee relationship which the trustee intended to create between the parties. None of the information contained in these records was communicated to the trustee at the time of the transaction; therefore it cannot be evidence of the intent of the trustee. At most, it relates only to a unilateral intent which can have no effect on the relationship of the parties as lessor and lessee.

The record is bare of any evidence to show that the intent of Union as trustee was to create a mortgage relationship with Syndicate. In fact, the record clearly negatives such an intent on the part of Union—an intent which is essential to a holding that Syndicate acquired equitable ownership as a mortgagor. In addition to the unequivocal testimony of Mr. Coney, the representative of the trustee, that no mortgage was intended, the record shows several actions of the trustee in which it consistently asserted the position of a lessor—not that of a mortgagee.

Thus when the lease went into default in the 1930's, Union asserted the right of a lessor to cancel on 60

days' notice with no right of redemption in the lessee. It did not threaten a mortgage foreclosure nor did Syndicate's officers believe they could assert a mortgagor's equity of redemption (R. 103, 106, 107).

It is also highly significant that when it came to the trustee's attention in 1938 that Syndicate's annual report by its independent auditor might be interpreted as showing that Syndicate had an ownership interest in the land and building, the trustee requested that the balance sheet presentation be changed (Ex. 52-N, pp. 5, 6). Syndicate acquiesced in the request and the revised balance sheet as of June 30, 1938, and subsequent reports show Syndicate as owning a leasehold estate (Exs. 16, 52-N, O, P). Indeed the revised balance sheet as of June 30, 1938, showing the changed method of presentation was incorporated in the printed letter of July 22, 1938, from Syndicate to the land trust certificate holders soliciting their consent to a lease modification (Ex. 16).

In short, in every instance where it had an opportunity to evidence its intent—by testimony, documents, and action — Union has uncompromisingly taken the position that the transaction was not a mortgage and that Syndicate had only a lessee's interest in the premises.

Also important as evidence of the intent of Syndicate and the trustee, and as a distinction between the two lines of income tax cases involving land trusts, is the fact that as a part of the original transaction Syndicate mortgaged its leasehold estate to secure a loan in

the face amount of $750,000. The leasehold mortgage is in evidence as Exhibit 8 (R. 15, 64). Bonds secured by this mortgage were sold to the public. For Syndicate and the trustee to have agreed that their relationship was not that provided by the terms of the lease would have been the grossest kind of fraud on these bondholders.

Appellant has found no case in which a transaction has been held to be a mortgage where, as here, the alleged mortgagor's leasehold interest in the property was used to secure a loan from third persons. The only case it has found involving a leasehold mortgage is *City National Bank Building Company v. Helvering,* 98 F.2d 216 (D.C. Cir. 1938), in which the contention that the transaction was a mortgage was rejected. It should be noted that the substance of the leasehold mortgage floated by Syndicate is emphasized by the fact that the leasehold bondholders actually foreclosed and became the owners of the leasehold (R. 7).

(c) The intention of the parties that Syndicate should have a leasehold estate is supported not only by testimony but by other significant facts in the transaction between the trustee and Syndicate.

There are two principal income tax cases holding a land trust arrangement to be a mortgage, *Helvering v. F. & R. Lazarus & Company,* 308 U.S. 252, 60 S. Ct. 209 (1939), and *Commissioner v. H. F. Neighbors Realty Company,* 81 F.2d 173 (6th Cir. 1936). We have pointed out that both of these cases are unlike the present case since both contained affirmative testimony by

one or both of the parties that a security arrangement was intended. There are other differences, the most important of which are listed below:

(1) In *Lazarus* and *Neighbors,* the taxpayers had owned the properties and buildings for some years. Syndicate had no prior interest in the property.

(2) In *Lazarus* and *Neighbors,* the taxpayers were seeking refinancing of existing mortgage indebtedness on the properties. Syndicate had no debt to refinance and neither applied for nor was offered a loan.

(3) In *Lazarus* and *Neighbors,* the property was conveyed to the trustee by the taxpayer. Here the property was sold to the trustee by a third party.

On the other hand, the similarity between the present case and the *City National* case is striking. With respect to each of the three points mentioned above, the *City National* facts parallel those in the present case and are unlike those in *Lazarus* and *Neighbors.*

In addition, the taxpayers in *Lazarus* and *Neighbors* were not given the right to mortgage their leaseholds. That right was given Syndicate and the lessee in the *City National* case and in both cases the leaseholds were mortgaged to secure a bond issue sold to the public.

Furthermore, it must be kept in mind that the question actually presented by the *Lazarus* and *Neighbors* cases was not whether the taxpayer made a capital investment in depreciable property as a part of the land trust certificate transaction. In those cases, as we have

seen, the taxpayer had an interest in depreciable property prior to the time of the transaction, since it was the original owner of the premises. The question in those cases was whether or not that investment had been recovered through a sale of the property to the trustee. In the instant case, the taxpayer had no interest in the property prior to the land trust certificate transaction. The issue in this case, therefore, is whether it made an original investment in depreciable property as part of the transaction. Since Syndicate admittedly had no obligation to repay the amount of the investment of the land trust certificate holders, the extent of its investment in the property is limited to the amount paid for the leasehold estate. The *Lazarus* and *Neighbors* cases are therefore not authority for the proposition that Syndicate acquired an interest in depreciable property in the 1927 transaction.

(d) The lease and declaration of trust on their face created a leasehold in Syndicate and are not evidence that the parties intended a mortgage transaction.

At one point in its opinion (R. 29) the District Court refers to "the action taken by the directors of all interested groups" as showing an intention to make Syndicate the owner of the building. So far as the directors of the trustee are concerned, the only evidence in the record of action by them is the recitals in the lease and declaration of trust that the directors authorized their execution. Similarly, the only action by the directors of Lumbermens Trust Company was to authorize execution of the mortgage indenture securing the lease-

hold bonds. Since the above-quoted language of the lower court's opinion is followed by a statement that the lease and declaration of trust by themselves show that all parties regarded Syndicate as the owner of the building (R. 29), it may be that the court thought that the formal recitals of director authorization in the instruments justified the assertion that the action of the directors of all parties showed an intention to make Syndicate the owner-mortgagor.

The District Court's attempt to find that the instruments on their face created in Syndicate an ownership interest rather than a leasehold does not stand up under analysis. The following points concerning the lease and trust agreement were noted by the court in its opinion (R. 29):

(1) The depreciation fund was under the control of Syndicate and the amount of the fund would be credited on the purchase price in the event of exercise of the option. The only significance of this provision is that it increased the likelihood that the option would be exercised since the fund would be forfeited to the trustee on termination of the lease. This is not evidence, however, that the parties regarded Syndicate as the owner from the beginning of the transaction. Many leases contain options to purchase at a specified price without having the effect of causing the lessee to be considered the owner either under property law concepts or for tax purposes. In this instance all that the Syndicate investors thought their company was receiving was a lease and the possibility "that we would ultimately be able to exer-

cise the option to acquire the property if the earnings panned out as well as indicated" (R. 74).

(2) The lease was for a period of 99 years, renewable forever. The law is well settled that the holder of a long-term lease, 99 years or more, will not for that reason be considered the owner of the property for income tax purposes. *Weiss v. Wiener,* 279 U.S. 333, 49 S. Ct. 337 (1929); *Dab v. Commissioner,* 255 F.2d 788 (2d Cir. 1958).

(3) The rent was fixed at 5½ per cent of the principal amount of the land trust certificates and remained so fixed irrespective of contingencies or change in values of property. This is true of many long-term leases in which the lessee assumes the risk that the rental value of the property will increase or decrease. A fixed rental is simply one of the terms which define the benefits and burdens attached to Syndicate's ownership of a long-term leasehold.

(4) The lease provided that if the property was appropriated to public use, the appropriation constituted an election by the lessee to purchase and, if the appropriation was only partial, there would be no reduction in the amount of the rent. Provisions of this general type are not unusual in a long-term lease. (See forms in McMichael, Leases, Percentage, Short and Long Term, Fourth Ed. (1947), p. 199.) In the case of *Dab v. Commissioner,* 255 F.2d 788 (2d Cir. 1958), a 99-year lease provided that if the property were condemned or the mortgage thereon foreclosed, 75 per cent of the proceeds of condemnation or foreclosure would be paid to the

lessee. The court held that this did not show a capital investment by the lessee in the building entitling him to depreciation.

(5) The lessee carried the insurance on the property and was to receive the benefits between the insurance proceeds and the cost of restoration in the event of casualty. Where a lease is made for a long term on a net lease basis, the lessee is required to keep the property insured and in such leases it is not uncommon to provide for payment to the lessee of excess insurance proceeds, McMichael, Leases, Percentage, Short and Long Term, Fourth Ed. (1947), p. 167. However, the mere existence of the right to excess insurance proceeds does not constitute an investment by the lessee in depreciable property any more than the existence of a right to condemnation or foreclosure proceeds entitled the lessee in the *Dab* case to claim depreciation. Of course, if Syndicate actually restored the premises at its own expense, then the amount so expended would represent a capital investment which it could recover through depreciation deductions.

Finally, substantially all of the factors listed above were present in the documents in the *Lazarus* and *City National* cases. Yet the courts in those cases accepted the fact that the documents themselves gave the trustee the fee and the taxpayer a leasehold. They recognized that to decide the question which the cases presented they were required to look to "extrinsic evidence behind a transfer absolute on its face to determine whether only a security transaction was contemplated by the parties."

Helvering v. F. & R. Lazarus & Company, 308 U.S. 252, 255, 60 S. Ct. 209, 211 (1939). And in *The Minneapolis Security Building Corporation,* 38 B.T.A. 1220 (1938), the Board held that the lessee under a land trust lease containing provisions of this type did not have an exhaustible interest in the building because "The exhausting property which it owns is the leasehold." 38 B.T.A. at 1221.

(e) Far from destroying appellant's position as the District Court thought, the Supreme Court decision in *Helvering v. F. & R. Lazarus & Company,* 308 U.S. 252, 60 S. Ct. 209 (1939), states the rule of law which appellant believes is controlling in this case.

The District Court in its opinion says that "the benefit of *City National* to plaintiff's position was destroyed by the decision of the Supreme Court in the *Lazarus* case" and that it considers "*Lazarus* to be the law in this case" (R. 31). These statements appear to result from the court's mistaken view that there is some special rule of ownership for "income tax purposes," for the court failed to recognize that the *Lazarus* case applies the same rule of property law as the *City National* case and only arrives at a different result because of factual distinctions which we have discussed at length earlier in this brief.

The factual distinctions between *City National* and *Lazarus* which we have pointed out and which were the express basis for the differing results reached by the Board of Tax Appeals in the two cases (see 34 B.T.A. 93, 99) were not swept aside by the Supreme Court

in its opinion in *Lazarus*. The Supreme Court simply found that the Board of Tax Appeals (i) had properly recognized that the formal written documents may not be controlling and (ii) had correctly held that the facts in *Lazarus* justified application of the equitable doctrine that a deed intended as security will be treated as a mortgage.

The applicability of the same equitable doctrine was examined by the Board in its *City National* decision and because of the factual differences the Board concluded that the parties had not intended the transaction to be a mortgage and that the lessee was not the owner. What the Supreme Court was concerned with in the *Lazarus* case was whether the Board of Tax Appeals had applied the correct rule of law. It found that it had. The same rule of law was applied in the *City National* case, and if it had been that case in which the Supreme Court granted certiorari, it seems clear that its opinion would have been written in substantially the same way, affirming the result reached by the Board of Tax Appeals and the Court of Appeals for the District of Columbia.

That the *Lazarus* case did not overrule the decision in *City National* is established by the most recent land trust case, *The Akron Dry Goods Company,* 18 T.C. 1143 (1952), *aff'd per curiam,* 218 F.2d 290 (6th Cir. 1954). The Tax Court's discussion of the *Lazarus* case was as follows:

> "In the instant proceeding the formal details of the land trust certificate transaction pertaining to the fee simple deed to the Bank as trustee for the certificate holders and the leasing of the properties

> at a specified rental, etc., are essentially similar to those obtaining in the case of *F. & R. Lazarus & Co.,* 32 B.T.A. 633, affd. 101 F.2d 728, affd. 308 U.S. 252, wherein it was held that a deed absolute in form was, in equity, a mortgage to secure a loan where the parties so intended, and the taxpayer was allowed depreciation on the buildings on the property embraced in the deed. On authority of that case the petitioner contends for a similar holding here. However, in the *Lazarus* case the facts are that, aside from the deed indicating a sale, the other facts surrounding the transaction and particularly the testimony of the officers of the taxpayer and of the bank as to their intentions *at the time,* established a mortgage loan transaction and not a sale. In the instant case we have no such testimony." 18 T.C. 1143, 1146-1147.

The decision of the Tax Court was affirmed by the same Court of Appeals which affirmed the holdings of the Board of Tax Appeals in the *Lazarus* and *Neighbors* cases. 218 F.2d 290 (6th Cir. 1954). If *Lazarus* had overruled *City National,* as the District Court thought, then in the *Akron Dry Goods* case the Tax Court should have held as a matter of law that the transaction was a mortgage and the Court of Appeals should have reversed the Tax Court decision that the transaction involved a sale of the property.

V

The District Court has erroneously applied the double tax benefit theory of the Akron Dry Goods decision to the present case.

The statement of the District Court in its opinion that "the decision in *Akron* actually supports the position of defendant in this case" could only result from an

erroneous belief that a holding for appellant would result in a double tax benefit to it. This is not the fact.

In the *Akron Dry Goods* case the lessee in a land trust transaction in 1928 claimed and was allowed a loss on its tax return for its fiscal year 1929 on the theory that it had sold rather than mortgaged its building. In the intervening years before 1945, it claimed no depreciation on the building. In 1945 it asserted that the land trust arrangement was a mortgage transaction and claimed depreciation on the building despite the fact that it had already recovered its tax basis for the building through the loss deduction in 1929. The Tax Court first found that the 1928 transaction was a sale rather than a mortgage and then supported its holding by a comment which is quoted in the opinion of the District Court in the present case as follows (R. 32):

> "Furthermore, now to correct for the purpose of a claimed tax deduction benefit in the taxable year 1945 an alleged mistake, but actually an inconsistent position, which resulted in the petitioner's election to take tax deduction benefit in the taxable year 1929—a year as to which any adjustment is barred by the statute of limitations—would be contrary to the established principle of not allowing a double tax benefit."

The District Court followed this quotation with a statement that—

> "Clearly, the decision in the *Akron* case is in full accord with the government's position in this court" (R. 32).

What the District Court failed to understand was that if the taxpayer in *Akron Dry Goods* had been successful it would have used its basis for the building

twice for tax purposes—first to establish a deductible loss in 1929 and again to support depreciation deductions in 1945 and subsequent years. This would have violated the prohibition against double tax benefit.

A holding for appellant in the present case cannot result in a double tax benefit. It is true that Syndicate mistakenly deducted depreciation on the American Bank Building from 1927 to 1943. But New Company is not asking that this depreciation be restored to its basis for the building—even though much of the depreciation was deducted in loss years without tax benefit. On the contrary, New Company's contentions with respect to the issue involved in this appeal accept the fact that its investment in its leasehold estate must be reduced by depreciation claimed on tax returns by Syndicate and itself up to the date of exercise of the option in 1945. Indeed, the "Unamortized balance of leasehold estate per books as of December 31, 1944," shown in paragraph XII of the pretrial order (R. 9) is an amount computed after deduction of the full amount of depreciation erroneously claimed on prior tax returns. It is only this reduced amount that New Company contends should be retained as a part of its aggregate basis for the property after exercise of the option in 1945. Not only is there no possibility of double tax benefit to New Company but $274,784.49 of the depreciation deductions with which New Company is charging itself were claimed in loss years and will never result in any tax benefit.

Obviously in this situation it was error to apply to New Company the "double tax benefit rule" which was applied in the *Akron Dry Goods* case.

VI

The agreement determining the tax liability of Syndicate for 1927 has no effect for subsequent years.

In 1929 Syndicate executed an agreement pursuant to Section 606, Revenue Act of 1928 (agreement attached to revenue agent's report which is part of Exhibit 51-A), agreeing to the Internal Revenue Service's final determination of tax liability for the 1927 tax year. The District Court's reference to this as "a final closing agreement" (R. 28) seems to indicate that it believed that Syndicate had agreed to use the depreciation basis for the American Bank Building shown in the revenue agent's report for 1927, not only for purposes of the 1927 tax year, but for all future tax years in which a computation of depreciation on that property might be involved.

If this was the lower court's view, it was founded on a completely erroneous interpretation of the nature of the agreement entered into by the parties. That agreement related solely to the amount of Syndicate's tax liability for the 1927 tax year and was a final agreement only in the sense that neither Syndicate nor the Treasury Department could thereafter reopen the question of Syndicate's 1927 tax liability. The agreement did not purport to bind Syndicate or its successors to the use of any particular depreciation basis for future years.

There was no authorization in the 1928 Internal Revenue Code itself or in the Treasury Department's regulations which would permit a taxpayer and the government to enter into a closing agreement of any

kind as to tax questions which might arise concerning future years. Prospective closing agreements binding the parties as to questions concerning tax years not terminated prior to the date of agreement were not authorized until the enactment of the 1938 Act.

When the agreement was signed in 1929, the governing law was Section 606, Revenue Act of 1928, as to which the applicable regulations provided (Reg. 74, Art. 1301):

> "Closing agreements provided for in section 606 may relate to any taxable period *ending prior to the date of the agreement.*" (Italics added.)

The words "ending prior to the date of the agreement" in the statute and the first sentence of the regulations are the only provisions relating to the scope of closing agreements and clearly did not permit prospective agreements. Syndicate could not, therefore, have entered into any binding agreement with regard to use of a depreciation basis in the future and neither it nor the Treasury Department in executing the 1929 agreement purported to do so. There is then no basis for any inference such as the District Court has drawn that by reason of the 1929 agreement New Company is bound to use in future years the depreciation basis set forth in the revenue agent's report for the year 1927.

CONCLUSION

The rule of property law adopted in all of the land trust income tax cases is that a deed absolute on its face will be declared a mortgage only if both parties to the transaction so intended. The record in this case affirmatively shows that in the land trust transaction by which it acquired the Northwestern Bank property, Union intended that it should occupy the position of owner and that Syndicate should occupy the position of lessee and did not intend Syndicate to be the owner-mortgagor. The District Court nevertheless held that Syndicate was the owner of the building. In so holding it failed to apply the proper rule of law and its decision should be reversed.

Respectfully submitted,

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APPENDIX

Pages of Transcript of Record Showing Exhibits

Exhibit No.	Identified	Offered	Received
1	14	62	62
2	14	62	62
3	14	63	63
4	14	63	63
5	14	63	64
6	14	64	64
7	15	64	64
8	15	64	64
9	15	158	158
10	15	158	158
11	15	65	65
12	15	65	65
13	16	65	65
14	16	66	66
15	16	159	159
16	16	159	159
17	16	66	66
18	16	159	159
19	16	66	66
20	16	66	66
50-A	17	142	143
50-B	17	142	143
50-C	17	142	143
50-D	17	142	143
50-E	18	142	143
50-F	18	142	143
50-G	18	142	143
50-H-1	18	142	143
50-H-2	18	142	143
50-I	18	142	143
50-J	18	142	143
50-K	18	142	143
50-L	18	142	143
50-M	18	142	143
50-N	18	142	143

Exhibit No.	Identified	Offered	Received
50-O	18	142	143
50-P	18	142	143
50-Q	18	142	143
50-R	18	142	143
50-S	19	144	144
51-A	19	144	145
51-B	19	144	145
51-C	19	144	145
51-D	19	144	145
51-E	19	144	145
51-F	19	144	145
51-G	19	144	145
51-H	19	144	145
51-I	19	144	145
51-J	19	144	145
51-K	19	144	145
51-L	19	144	145
51-M	19	144	145
51-N	20	144	145
51-O	20	144	145
51-P	20	144	145
51-Q	20	144	145
51-R	20	144	145
51-S	20	144	145
51-T	20	144	145
51-U	20	144	145
51-V	20	144	145
51-W	20	144	145
51-X	20	144	145
51-Y	20	144	145
52-A	20	149	150
52-B	21	149	150
52-C	21	149	150
52-D	21	149	150
52-E	21	149	150
52-F	21	149	150
52-G	21	149	150
52-H	21	157	157
52-I	21	157	157

Exhibit No.	Identified	Offered	Received
52-J	21	157	157
52-K	21	157	157
52-L	21	157	157
52-M	21	157	157
52-N	21	157	157
52-O	21	157	157
52-P	21	157	157
54-A	22	146	147
54-B	22	146	147
54-C	22	146	147
54-D	22	146	147
54-E	22	146	147
54-F	22	146	147
54-G	22	146	147
54-H	22	146	147
54-I	22	146	147

No. 17,037

United States
COURT OF APPEALS
for the Ninth Circuit

BUILDING SYNDICATE COMPANY,
an Oregon Corp.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the Judgment of the District Court for the District of Oregon

BRIEF FOR THE APPELLEE

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CITATIONS

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BUILDING SYNDICATE COMPANY,
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---

BRIEF FOR THE APPELLEE

OPINION BELOW

The District Court's findings of fact and conclusions of law (R. 32-39) are not officially reported. The opinion of the District Court (R. 23-32) is reported at 181 F. Supp. 725.

JURISDICTION

This appeal involves federal income taxes for the calendar year 1953, which were paid by the taxpayer at various dates in 1954 and on September 21, 1956. (R. 10-11.) On October 26, 1956, the taxpayer filed its

claim for refund, and on July 18, 1957, it filed an amended claim. This was rejected by the District Director of Internal Revenue on April 2, 1958. (R. 11.) Within the time provided in Section 3772 of the Internal Revenue Code of 1939 the taxpayer brought an action in the District Court for recovery of the taxes paid. (R. 3.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. Judgment was entered on April 14, 1960. (R. 40.) Within sixty days and on May 13, 1960, a notice of appeal was filed. (R. 41.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether the District Court was clearly erroneous in finding, on the basis of conflicting evidence, that the taxpayer (new company) and its predecessor, Building Syndicate, owned the American Bank Building in substance from the year 1927, so that the predecessor company properly took annual depreciation based on its cost and the taxpayer should not be permitted to add to its depreciated basis the amount which it paid in 1945 in satisfaction of a loan represented by the land trust certificates.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

* * * * *

(l) [as amended by Sec. 121(c), Revenue Act of 1942, c. 619, 56 Stat. 798] *Depreciation.*—A

reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income.

In the case of property held by one person for life with remainder to another person, the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each.

* * * * *

(26 U.S.C. 1952 ed., Sec. 23.)

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property.

* * * * *

(b) *Adjusted basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

* * * * *

(26 U.S.C. 1952 ed., Sec. 113.)

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

(a) *Basis for Depreciation.*—The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 113 (b)

for the purpose of determining the gain upon the sale or other disposition of such property.

* * * * *

(26 U.S.C. 1952 ed., Sec. 114.)

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 234. (a) In computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

* * * * *

(7) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence;

* * * * *

STATEMENT

During 1927, the Northwestern National Bank of Portland, Oregon, owned a building which it offered for sale through a real estate broker. This broker, George N. Black, paid $10,000 for an option to purchase the property for approximately $2,200,000. In order to facilitate the sale of the building, Black secured a financial commitment from George W. York & Company, Inc., of Cleveland, Ohio, dated June 21, 1927, to underwrite an issue of land trust certificates in the amount of $1,350,000. (R. 4, 33.) Some time after June 21, 1927, George W. York & Company, Inc., associated with it the Union Trust Company of Cleveland for the purpose of carrying out its commitment. (R. 5.)

Building Syndicate, an Oregon corporation, herein sometimes called Syndicate, was organized on August 1, 1927, with an authorized capital of 7,500 shares of

no par common stock. This stock was subscribed at $40 per share or an aggregate of $300,000. George N. Black transferred to Building Syndicate his option to purchase the bank property in payment of $10,000 on his subscribed stock. (R. 33.) The directors of Building Syndicate agreed that the building be held in trust by Security Savings and Trust Company of Portland and the Union Trust Company of Cleveland. The trustees were to issue a lease to Building Syndicate for a term of 99 years renewable forever. The directors of Building Syndicate negotiated a commitment from the Lumbermen's Trust Company to underwrite $750,000 of leasehold bonds to be issued by Building Syndicate. (R. 33-34.)

The purchase of the building and the necessary agreements were approved at a special meeting of the board of directors of Building Syndicate on September 19, 1927. The minutes of the board of directors state (R. 34-35):

> There was thereupon presented to the Board for consideration a form of escrow agreement, dated as of September 19, 1927, proposed to be executed by Northwestern National Bank, Security Savings and Trust Company, Building Syndicate, Lumbermen's Trust Company and a local bank to be named hereafter (said bank when named to act as agent for Northwestern Mutual Life Insurance Company, holder of a present mortgage on the Northwestern Bank Building property), said escrow being directed to Title and Trust Company, and setting forth in detail the amounts of money to be paid by this company for the purchase of said Northwestern Bank Building property, and the amounts of money to be received by this company from the purchasers

of the 1350 land trust certificates, the issue of which has been hereinbefore authorized, and to be received from Lumbermen Trust Company for the purchase of the $750,000.00 par value first mortgage leasehold bonds of this company, a copy of said escrow agreement being hereinafter set forth as Exhibit "D" to the minutes of this meeting.

On motion duly made and seconded, it was unanimously

Resolved, that the President of this company execute in the name of this company and as its act and deed said escrow agreement.

Resolved Further, that the President and Secretary of this company be and they hereby are authorized and empowered to deliver to Title and Trust Company, as escrow holder, all of the instruments provided to be delivered to it under the terms of said escrow agreement.

Resolved Further, that said officers be and they hereby are authorized and empowered to consummate all sales of securities, execute and deliver all documents, receive all considerations for the sale of securities, and make all payments to Northwestern National Bank provided to be made by the terms of said escrow, and to do and perform all other acts required to be done by this company in order to effect the purchase of said Northwestern Bank Building property in time and manner as is provided for by the terms and condition of said declaration of trust, Exhibit "A", said lease, Exhibit "B," said mortgage, Exhibit "C" and said escrow agreement, Exhibit "D."

Pursuant to the terms of the escrow agreement executed about September 30, 1927 (R. 35), the following occurred (R. 5-6):

By deed dated September 16, 1927, the Northwestern Bank Building property was conveyed by

Northwestern National Bank to Security Savings and Trust Company. Under date of August 15, 1927, though actually executed September 30, 1927, Security Savings and Trust Company as trustee and the Union Trust Company of Cleveland as co-trustee, executed an Agreement and Declaration of Trust between themselves and "The Holders of Land Trust Certificates of Equitable Ownership in the Northwestern Building Site Located in Portland, Oregon, Leased to Building Syndicate (an Oregon corporation)." A lease of the property was entered into between Building Syndicate as lessee and Security Savings and Trust Company, trustee, as lessor, the lease being made as of August 15, 1927, though actually signed September 30, 1927. Building Syndicate entered into an indenture with Lumbermen's Trust Company made as of September 1, 1927, to secure an issue of $750,000 first mortgage leasehold bonds.

The property was conveyed to the trustees, for the benefit of the land trust certificate holders, upon payment to the sellers of $2,202,133.07. The sources of these funds were (R. 36):

From Trustee for Land Trust Certificate Holders (Proceeds of sale of 1,350 Land Trust Certificates of Equitable Ownership)	$1,250,000.00
From Building Syndicate (Proceeds of leasehold bonds and stock)	952,133.07
	$2,202,133.07

The board of directors of Building Syndicate changed the name of the property from the North-

western Bank Building to the American Bank Building in 1928. (R. 35-36.)

In 1932 the leasehold bonds of Building Syndicate were in default and a bondholder's committee was organized. In 1943 the bonds were still in default and the trustee of the bondholders foreclosed on Building Syndicate on December 31, 1943. (R. 37.)

On November 9, 1944, a new corporation known as Building Syndicate Company, herein called the taxpayer, was organized. All the assets of Building Syndicate, including the lease on the bank building, were transferred from the trustee of the bondholders to the taxpayer corporation (new company) on December 31, 1944. The acquisition of the assets by the trustee of the bondholders and their transfer to the taxpayer were pursuant to a tax-free reorganization under the Internal Revenue Code. (R. 37.)

The original lease issued to Building Syndicate contained an option in favor of Building Syndicate whereby it could purchase the fee title from the lessor upon written notice. The trust agreement with the trustee also contained the provisions for acquisition of the fee title by Building Syndicate. Pursuant to the option, the taxpayer (new company) paid the required sums and acquired title to the property on October 31, 1945. (R. 37-38.) The funds for such purchase were derived as follows (R. 38):

Proceeds of loan from Prudential Insurance Co. to Building Syndicate Co.	$1,200,000.00

Application of 138 Land Trust Certificates held by Trustee in depreciation fund pursuant to provisions of lease (at $1,050 per certificate)	144,900.00
From Building Syndicate Co. corporate funds	72,600.00
	$1,417,500.00

Through the years 1927-1943, Building Syndicate claimed and was allowed deductions as owner for depreciation of the American Bank Building based on a useful life estimated in 1927 to be 36 years. (R. 9, 36.) For the year 1944, the return filed by Portland Trust & Savings Bank as trustee for the former bondholders of Building Syndicate computed depreciation on the same basis and in approximately the same amount. (Ex. 51-U.) On its tax return for the year 1945, the taxpayer claimed depreciation from January 1, 1945, on the new allocated cost of the building (following the taxpayer's acquisition of legal title). Under these methods the taxpayer and its predecessor had claimed deductions through October 31, 1945, in the total amount of $549,215.08. Computed on the basis of amortization over a 99 year life, the aggregate amortization of the leasehold as of October 31, 1945, would have been only $172,272.65. The excess of deductions taken over what leasehold amortization would have been is $376,942.43, of which $274,784.49 did not result in tax benefit. (R. 9-10, 38.)

When the taxpayer (new company) purchased the title to the building on October 31, 1945, and the land

trust certificates were retired, the taxpayer made an adjustment to the basis of the building. It added to the undepreciated basis of the building the amount of the land trust certificates, and reallocated the total between the land and the building. (R. 37-38.)

For the year 1953 involved here, the taxpayer claimed certain depreciation on the building, contending in the District Court (1) that the amount which it paid in 1945 to acquire title to the property should be taken into account in computing its basis for depreciation of the property, and (2) that its basis in the building should not be reduced by the amounts claimed as depreciation by the taxpayer and its predecessor in excess of amortization of its leasehold cost to the extent that such excess resulted in no tax benefit. (R. 11.)

The District Court found that, during the years 1927 through 1943, Building Syndicate was the owner of the property in question for income tax purposes; that during those years Building Syndicate had properly computed the depreciation allowance based on the total purchase price in 1927 of the depreciable building (R. 39); that the retirement of the land trust certificates (in 1945) was equivalent to refinancing a loan and had no effect on the basis of the property (R. 38); and that the basis for depreciation in the new company (taxpayer) is the same as it was in the old (R. 39).

The District Court dismissed the taxpayer's suit with prejudice (R. 40).

On this appeal, the taxpayer's only contention is that the amount which it paid in 1945 to acquire title to the building should be taken into account in computing its basis for depreciation. (Br. 7.)

SUMMARY OF ARGUMENT

The findings of the District Court that during the years 1927 through 1943 Syndicate was the owner of the property in question for income tax purposes, that it properly computed the depreciation allowance based on the total purchase price of the depreciable building, and that the retirement of the land trust certificates by the taxpayer was equivalent to paying a loan and had no effect on the basis of the property are findings of fact based on evidence which would at most permit conflicting inferences. We submit, therefore, that they are not clearly erroneous, and ought to be considered conclusive here. The District Court, we believe, was wholly correct in its opinion that the instant case is controlled by the general principles announced in *Helvering* v. *Lazarus & Co.*, 308 U.S. 252. The similarity of the facts found in that case and relied upon by the Supreme Court to those in the instant case is striking. Such distinctions as the taxpayer here would draw between its situation and that in *Lazarus* have been held of no significance in the very case upon which the taxpayer relies most heavily.

The taxpayer here is attempting to repudiate a position and a course of action which was admittedly followed to the benefit of its predecessor for 18 years,

whose basis it must take, and which the Internal Revenue Service implicitly approved by a closing agreement attached to the 1927 tax return. This position was that Syndicate owned the American Bank Building from 1927 and was entitled to annual depreciation deductions based on the cost of the building and its estimated useful life of 36 years in 1927. The record is replete with evidence that all concerned understood and intended Syndicate to be the owner of the property from 1927, and the law supports that position. The taxpayer, however, seeing an opportunity to increase its present tax deductions by repudiating that position, now urges that everyone was mistaken during all those earlier years. It says that actually Syndicate was only a lessee and should have been amortizing its 99-year lease; only in 1945 when the taxpayer acquired legal title to the property by paying $1,417,500 for the legal title did it become entitled to depreciate the building itself. But this amount which the taxpayer paid in 1945 and which it now seeks to add to the basis of the property had already been included in the basis and depreciated since 1927; the amount paid by the taxpayer in 1945 represents only the repayment of a loan, which obviously cannot affect the basis of the property. The District Court's holding that the taxpayer thus seeks an unjustified double tax benefit is thereby clearly correct.

The District Court based its opinion on the assumption, to which the taxpayer agrees, that if Syndicate properly claimed and was allowed depreciation on the cost of the building in the years after

1927, then the taxpayer is not entitled to add to the depreciated basis of the building any part of the amount which it paid to acquire legal title in 1945. The taxpayer complains of the District Court's holding that Syndicate properly claimed depreciation after 1927 because it was the owner of the building for tax purposes. Yet it is clear that one who is not technically the owner may nevertheless bear the burden of exhaustion of capital investment. One need not be the holder of legal title or a mortgagor in the classical sense of that word to claim depreciation. Notwithstanding that the instrument under which Syndicate held the property was in format a lease and option to purchase the fee, this Court has held that the holder of property under such an instrument was actually purchasing it from the beginning and was entitled to depreciation for tax purposes, regardless of his classification under rigid principles of property law. This is an application of the basic principle that the substance of a transaction governs for tax purposes.

The record here is replete with documentary and stipulated evidence indicating an intention and understanding by all parties that Syndicate was purchasing the property in 1927. In the face of that evidence, the District Court was not obliged to credit parol testimony to the contrary, some of which was simply self-serving, even if such evidence was admissible, which is doubtful.

ARGUMENT

The District Court was not clearly erroneous in finding, on the basis of conflicting evidence, that the taxpayer (new company) and its predecessor, Syndicate, owned the American Bank Building in substance from the year 1927, so that the predecessor company properly took annual depreciation based on its cost, and the taxpayer should not be permitted to add to its already depreciated basis the amount which it paid in 1945 in satisfaction of a loan represented by the land trust certificates.

A. The findings of the District Court, based on evidence which would at most permit conflicting inferences, are not clearly erroneous, and since they are essentially similar to the findings in Helvering v. Lazarus & Co., 308 U.S. 252, the result here should be controlled by that decision.

The findings of the District Court (R. 38-39) that during the years 1927 through 1943 Syndicate was the owner of the property in question for income tax purposes, that it properly computed the depreciation allowance based on the total purchase price of the depreciable building, and that the retirement of the land trust certificates by the taxpayer was equivalent to refinancing a loan and had no effect on the basis of the property are findings of fact based on evidence which would at most permit conflicting inferences. We submit, therefore, that they are not clearly erroneous, and ought to be considered conclusive here. *Helvering* v. *Lazarus & Co.,* 308 U.S. 252. In the case of *Akron Dry Goods Co.* v. *Commissioner,* 218 F. 2d 290 (C.A. 6th), where the facts were significantly different from those here, the Court of Appeals held also that the findings were conclusive upon review.

The District Court, we believe, was wholly correct in its opinion that the instant case is controlled by the general principles announced in *Lazarus*. The taxpayer there owned a building which it conveyed to a trustee and took back a 99-year lease plus an option to renew and purchase. The Commissioner disallowed the depreciation deduction to the taxpayer on the theory that the right thereto followed legal title. However, the Board of Tax Appeals found that the instrument under which the taxpayer purported to convey legal ownership to the trustee was in reality given and accepted as no more than security for a loan on the property; the "rent" stipulated in the concurrently executed 99-year "lease" back was intended as a promise to pay an agreed 5% interest on the loan; and the "depreciation fund" required by the "lease" was intended as an amortization fund, designed to pay off the loan in 48½ years. The Supreme Court held that the findings were supported by evidence which permitted at most conflicting inferences and were therefore conclusive. As a matter of law, the Court held that the transaction was actually a loan secured by the property involved, and that the taxpayer was entitled to the depreciation deduction. The similarity to the instant case is striking. Upon conflicting evidence which is discussed in detail below, the District Court here found that the taxpayer was the owner of the property during the years 1927 through 1943. (R. 39.) The rent to be paid by Syndicate represented 5½% on the total certificates outstanding at a par value each of $1,000. (Ex. 52-B.)

And the depreciation fund to which Syndicate was contractually obligated to make annual payments was designed to provide a fund to pay off most of its obligation. The only difference between the instant case and *Lazarus* is that here this device was used to finance purchase of the property, which was conveyed to the trustee at Syndicate's instance, whereas in *Lazarus* the taxpayer previously owned the building and itself conveyed the property to the trustee as security for the loan of money.

The taxpayer seizes upon this difference as significant, and relies upon *City Nat. Bank Bldg. Co.* v. *Helvering,* 98 F. 2d 216 (C.A. D.C.), where this difference also existed, in support of its position. However, the very court which decided that case regarded this difference as of no importance, stating (p. 217) that "the facts were in all essential respects identical" to *Lazarus*. The Supreme Court itself granted certiorari in *Lazarus* on the ground of a conflict with *City Nat. Bank Bldg. Co.,* and pointed to the circumstance that the Court of Appeals for the District of Columbia considered the *City Nat. Bank Bldg. Co.* case upon its facts in all essential respects identical to *Lazarus*. The Supreme Court further stated that because of a conflict between the results reached by the Court of Appeals for the District of Columbia and the Court of Appeals for the Sixth Circuit, it had granted certiorari. It then resolved this conflict against the result reached by the Court of Appeals for the District of Columbia. In such circumstances, the District Court was clearly on sound ground in concluding that all aid from the

City Nat. Bank Bldg. Co. case to the taxpayer was destroyed by the Supreme Court in *Lazarus*.

The taxpayer derived its interest in the property from Syndicate through a tax free reorganization under the Internal Revenue Code. (R. 7, 25, 37.) There is and can be no dispute that it inherited Syndicate's basis and whatever basis Syndicate correctly possessed is the taxpayer's basis. Indeed, the issue turns in large part upon a determination of what in fact was Syndicate's basis. As already discussed, the District Court's finding with respect to Syndicate's basis should be conclusive here, since not clearly erroneous.

B. The taxpayer should not be permitted to repudiate a position maintained by its predecessor to its benefit for eighteen years, especially where such repudiation would result in an unjustified double tax benefit

In the consideration of the instant case, it should be kept in mind that what the taxpayer is attempting to do is to repudiate a position and a course of action which its predecessor, Syndicate, admittedly followed to its benefit for 18 years, and which the Internal Revenue Service implicitly approved by a closing agreement attached to the 1927 tax return. (Exs. 50-A and 51-A.) This position, now sought to be repudiated, was that Syndicate owned the American Bank Building from 1927 and was entitled to annual depreciation deductions on its income tax returns based on the cost of the building and the estimated useful life of the building in 1927. (A revenue agent's report

attached to the 1927 closing agreement specifically noted that Syndicate had allocated $1,093,400 as the basis for depreciation of the building.) The record is replete with evidence that everyone concerned understood Syndicate to be the actual owner of the building in 1927, and we believe that the law supports that position. Notwithstanding that its predecessor reaped the benefits of that position, the taxpayer, seeing an opportunity to increase its tax deductions in later years by repudiating it, is here urging that everyone was mistaken during all those years. The true situation, the taxpayer now says, is that Syndicate was merely a lessee during that time, and instead of claiming depreciation based on the cost of the building and its remaining useful life in 1927, it should have been amortizing its 99-year lease; only in 1945, says the taxpayer, when it acquired legal title to the building by paying over $1,417,500 (R. 8) did it become entitled to depreciate the building itself. We submit that the position of the taxpayer here is analogous to that of the taxpayer in *Maletis* v. *United States,* 200 F. 2d 97 (C.A. 9th), certiorari denied, 345 U.S. 924, who set up and asserted the validity of a family partnership when business was profitable, and then attempted to repudiate the validity of the partnership when it suffered a loss. In disallowing the attempted repudiation of the partnership, this Court said (p. 98):

> The Bureau of Internal Revenue, with the tremendous load it carries, must necessarily rely in the vast majority of cases on what the taxpayer asserts to be fact. The burden is on the taxpayer to see to it that the form of business he has

> created for tax purposes, and has asserted in his returns to be valid, is in fact not a sham or unreal. If in fact it is unreal, then it is not he but the Commissioner who should have the sole power to sustain or disregard the effect of the fiction since otherwise the opportunities for manipulation of taxes are practically unchecked. That which best serves the purpose of the tax statute should govern in this field and not the yearly exigencies of this taxpayer.

See also *Phillips* v. *United States,* 193 F. 2d 132, 133 (C.A. 5th), where the court upheld the position that—

> the government takes the taxpayer as he represents himself to be, and he cannot play fast and loose, now you see it, now you don't, with the government.

If the present position of the taxpayer is correct, Syndicate should have deducted a total amount of $172,272.65 during the period 1927-October 31, 1945, by way of amortizing its lease, rather than a total amount of $549,215.08 by way of deductions for depreciation of the building. In pursuance of this theory, the taxpayer contended at the trial that everything which Syndicate deducted over the years in excess of what it should have deducted by way of amortizing its lease should not be applied to reduce the basis in the building. (R. 12.) The taxpayer also claimed that it should be allowed to add to its basis the sum which it paid in 1945 to acquire the legal title to the building. (R. 8.) Upon this appeal, the taxpayer has dropped the contention that its basis should be restored to the extent Syndicate claimed excessive deductions. The taxpayer now contends only that it should

be allowed to add to the basis of the building, as reduced by the year 1944, the amount which it paid in the year 1945 to acquire legal title. (Br. 7.)

While the taxpayer asserts (Br. 30-32) that the addition to its already depreciated basis in the building of the amount which it paid for the legal title to the building in 1945 will not result in a double tax benefit, upon analysis this will be seen to be erroneous. Thus, the balance sheets on Syndicate's tax returns, beginning in 1938 (Ex. 51-B *et seq.*) show that, of the building's stipulated total cost in 1927 of $2,202,-133.07 (R. 6), Syndicate allocated $1,093,400 to the building and $1,097,662.50 to the land.[1] It has depreciated the building by deducting a total of $549,-215.08, leaving a basis still to be depreciated of $544,-184.92. (R. 10.) When the taxpayer purchased legal title to the property in 1945, paying the amount prescribed in the option contained in the lease agreement of August 15, 1927 (R. 8), it allocated so much of that price to the building as to create a new basis of $1,000,779.96 in the building (R. 9). But this amount which the taxpayer paid in 1945 and which it now seeks to add to the basis of the property had already been included in the basis and depreciated since 1927; the amount paid by the taxpayer in 1945 represents

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[1] It is recognized that the actual total of $1,093,400 plus $1,097,662.50 varies slightly from the stipulated cost of $2,202,-133.07.

Beginning with the 1930 return, Syndicate carried the building as an asset valued at $1,101,074.62 (or more due to improvements it had made), and it carried the land at an approximate value of $1,099,000. (Ex. 51-D *et seq.*)

only the repayment of a loan, which obviously cannot affect the basis of the property. *Helvering* v. *Lazarus & Co., supra.* The closeness of the basis allocated to the building in 1927 to that allocated to it in 1945 indicates that what the taxpayer has done in effect is to restore to the basis of the building in 1945 practically everything which has already been deducted by way of depreciation over the years 1927-1944. It now proposes to depreciate that restored basis all over again on an assumed life of 32 years from January 1, 1945. (R. 9-10.) The District Court's holding, on the authority of *Akron Dry Goods Co.* v. *Commissioner,* 18 T.C. 1143, affirmed *per curiam,* 218 F. 2d 290 (C.A. 6th), that the taxpayer seeks an unjustified double tax benefit is therefore clearly correct.

C. The substance of the transaction involved here was that Syndicate was making a capital investment in the building and purchasing it, and the tax consequences should not be based on the technicalities of property law and conveyancing

The District Court grounded its opinion on the assumption that if Building Syndicate properly claimed and was allowed depreciation based on the cost of the building in the years after 1927, then the taxpayer is not entitled to add to the depreciated basis of the building any part of the amount which it paid to acquire legal title in 1945. It is admitted in the taxpayer's argument that this is a correct statement of the issue.[2] (Br. 11-12.) The taxpayer complains, how-

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[2] Implicit in this approach to the case by the taxpayer is the admission that Building Syndicate Company and the taxpayer as its successor have the same basis in this property. (R. 7-9, 25, 37.)

ever, of the court's determination of the issue by inquiring whether or not the taxpayer should be treated as the owner of the building *for tax purposes*. The taxpayer insists that only "property law tests for determining ownership" are relevant. (Br. 12-13.) By this we must suppose that the taxpayer is not insisting that only the holder of legal title to the fee is entitled to be considered the owner, for this would conflict with cases which the taxpayer says are correct, although it erroneously alleges them to be distinguishable from the instant case. (Br. 22-23.) *Helvering* v. *Lazarus & Co.,* 308 U.S. 252; *Commissioner* v. *H. F. Neighbors R. Co.,* 81 F. 2d 173 (C.A. 6th). The taxpayer also seems willing to agree that if it were a mortgagor in the classical sense of the word, it would have been entitled to depreciation. (Br. 14-15.) At the same time, the taxpayer points out that a mere lessee of property, no matter how long the term, is not entitled to depreciation. *Weiss* v. *Wiener,* 279 U.S. 333. What the taxpayer does seem to mean by insisting on "property law tests for determining ownership" is that the court must take the taxpayer's name for its relationship to the property at face, and determine the consequences on that basis: if the relevant instrument says that the taxpayer is the fee owner or a mortgagor, it may take depreciation; if the instrument says the taxpayer is a lessee, it may not. In this the taxpayer has overlooked the well-known principle that in tax matters substance prevails over form,[3] as well

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[3] In *Helvering* v. *Lazarus & Co., supra,* the Supreme Court said (p. 255):

as recent cases involving the transfer of property by lease plus option to the lessee to buy in which this Court has held that a lessee was a purchaser for tax purposes at the time of the transaction, even though the option to buy had not been exercised. *Oesterreich* v. *Commissioner,* 226 F. 2d 798 (C.A. 9th); *Robinson* v. *Elliott,* 262 F. 2d 383 (C.A. 9th). The Court in those cases did not look merely at the labels on the formal documents, but rather at the realities of the transaction determined according to what the parties intended.

In the *Elliott* case, the owner of a building issued to one Buttrey a "Lease Agreement and Option to Purchase" which provided for ten annual payments of $19,000 each as rent with an option at the end for Buttrey to acquire the property for the sum of $75,000. In the ten-year interim Buttrey was to be responsible for all of the usual burdens of the owner such as property taxes, insurance premiums and repairs. On the basis of this agreement alone, without even ruling as to whether parol evidence was admissible, this Court held (p. 385) that the trial court was "justified in recasting the agreement for tax purposes * * * ." The effect of this recasting was to entitle the lessor to

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> In the field of taxation, administrators of the laws and the courts are concerned with substance and realities, and formal written documents are not rigidly binding.

Recently the Supreme Court has again given expression to this principle in *Commissioner* v. *P. G. Lake, Inc.,* 356 U.S. 260, 266-267, saying:

> These arrangements seem to us transparent devices. Their forms do not control. Their essence is determined not by subtleties of draftsmanship but by their total effect.

treat the annual payments of $19,000 which he received as capital gain, and to deprive Buttrey of the right to deduct them as rent. In effect the Court held (and so stated) that Buttrey was making a capital investment. Under such circumstances, this Court has held that a taxpayer also acquires the right to take the depreciation deduction. *Starr's Estate* v. *Commissioner,* 274 F. 2d 294, 295 (C.A. 9th). We see no difference in principle between the agreement in the *Elliott* case and that involved in the case at bar. Both provided for a substantial option price to be paid before the lessee would acquire title; both placed all the burdens of ownership on the lessee;[4] in neither could the lessee have been neatly categorized in terms of property law as a legal owner or as a mortgagor. As the Court noted in *Elliott* (p. 385):

> No doubt under Montana law the document would be always what it called itself: "Lease Agreement and Purchase Option."

For purposes of tax law, however, the document was held to be what it was in substance. In the case at bar, where everyone concerned seemed satisfied for 18 years that the substance of the arrangement under which Syndicate held the American Bank Building entitled it to the depreciation deduction, the taxpayer's present attempt to repudiate that by reliance upon rigid principles of conveyancing and property law seems particularly inapproriate.

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[4] See Ex. 7, Article Five.

D. The documentary evidence demonstrates the intention of the parties that Syndicate was purchasing the property and was in fact the owner of it from the time of the 1927 transaction

Although the taxayer admits that its present position is inconsistent with Syndicate's previous tax returns, its corporate minutes, and accounting records (Br. 18-19), we deem it important to call such parts of these documents to the Court's attention as will show that this was not an arrangement by which Syndicate simply became the lessee of property with an option to buy if it chose. On the contrary, these records show that the whole transaction was set in motion by Syndicate as assignee of an option to *buy* the property from the Northwestern National Bank (Ex. 2 (corporate minutes), pp. 14-15; see R. 99), and that its intention was to buy the property. All the other parties eventually involved in the arrangement including George W. York & Company, Union Trust Company of Cleveland, Security Savings and Trust Company, Lumbermen's Trust Company, and the holders of land trust certificates, were in it only for financing purposes (R. 4-6). Syndicate's corporate minutes show that its board of directors was urging that "the subscriptions to capital stock of this company be paid in cash in full on or before September 1, 1927, in order to provide funds with which to effect the purchase of the Northwestern Bank Building property * * * ." (Ex. 2, p. 19.[5]) The minutes also referred

[5] Actually some $200,000 of Syndicate's own cash went into the purchase of the property in 1927. The record shows that Syndicate provided $952,133.07 toward the purchase price from

to the escrow agreement (which is now missing and not a part of this record) as "setting forth in detail the amounts of money to be paid by this company for the purchase of said Northwestern Bank Building property * * * ." (Ex. 2, p. 34.) Again, the minutes of September 27, 1927, state the following (Ex. 2, pp. 36-37):

> The president then stated to the directors that the meeting had been called for the purpose of informing the stockholders as to the actions taken by the directors and officers of the company relative to the purchase of the Northwestern Bank Building property and the completion of the financing connected therewith.

And further (Ex. 2, pp. 37-38):

> that the stockholders of this company do hereby ratify and approve all actions taken by the Board of Directors of this company and under the authority of the Board of Directors by the officers of this company in executing documents, receiving consideration for the sale of securities, and making payments to the Northwestern National Bank required to be made by this company in connection with the purchase by this company of the Northwestern Bank Building property in Portland.

Syndicate's proposed depreciation and amortization entries as of December 31, 1927, plainly demonstrate that it thought it had purchased the property. (Ex. 54-A.) It allocates to the building 49.7% of the total consideration paid ($1,093,400), refers to the *purchase*

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the proceeds of sale of leasehold bonds and of stock. (R. 6.) Since the bonds were issued in the aggregate amount of $750,000 (R. 6), the difference of $202,133.07 must have been Syndicate's capital acquired by the sale of its stock.

of the building by Building Syndicate, and states that—

> The period of 3 months ownership by Building Syndicate is ¼ of $30,372.22 or $7,593.05: Depreciation Reserve to December 31, 1927.

Thereafter, as noted above, Syndicate carried the building on its balance sheets (as contained in its tax returns) as an asset valued at $1,093,400 or more, and claimed annual depreciation thereon of $30,372.20 or more until 1944. (Exs. 51-C—51-U.) And, as the District Court found, in each of its returns through 1942, Syndicate stated its business as "Owns and Operates Office Building", or "Building Ownership", or "Building Owner", while the land trust certificates and leasehold bonds were carried as corporate liabilities. (R. 36-37.) Syndicate's returns from 1928 through 1931 further show that the annual rental payable by Syndicate was deducted under the heading of "Interest Expense". (Exs. 51-B—51-E.) The annual report of Syndicate's independent accountants dated December 31, 1928, also shows that this annual rental was regarded as interest expense representing 5½% on the total land trust certificates outstanding at a par value each of $1,000. (Ex. 52-B.) This same annual report of the accountant stated on page 1:

> This corporation owns the American Bank Building, the management of which is with the Strong & McNaughton Trust Co.

On page 2, the report further shows:

> FIXED ASSETS—The purchase of the building and building site of the American Bank Building was made at cost of $2,200,000.00.

As a further indication of the purpose of this whole transaction to result in Syndicate's purchase of the property and not its mere leasing thereof, we call attention to the requirement in Article Three of the Indenture of Lease (Ex. 7, pp. 7-10) that Syndicate set up a depreciation fund in the sum of $1,200,000, and pay into it annually for the first 10 years $6,750, and thereafter $10,000 per year. Article Four of the lease provides that the amounts in this fund should, upon Syndicate's decision to exercise its option to purchase the fee title, be credited on such purchase price. On the other hand, if the lease expired for any reason and Syndicate had not exercised its option, the fund was to become the property of the trustee. Thus, the longer Syndicate paid these required amounts into the depreciation fund, the more likely it was to exercise the option rather than forfeit the fund to the trustee. If the fund in fact were ever to have become fully paid up in the amount of $1,200,000 as contemplated, it would have lacked only $217,500 of covering the entire option price of $1,417,500, and Syndicate would hardly have considered forfeiting it. Cf. *Oesterreich* v. *Commissioner, supra; Commissioner* v. *H. F. Neighbors R. Co.,* 81 F. 2d 173, 175 (C.A. 6th). Thus, the creation of this fund was plainly a part of the arrangement under which Syndicate was contractually obligated to put aside funds which would eventually be used to pay off the loan made to it.[6]

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[6] It should be noted, however, that where property is pledged as security for the payment of a debt, the pledgee or mortgagee is considered a creditor regardless whether the

We may also note, as an indication of Syndicate's relationship to the property, that in event of condemnation of substantially all of the premises, Syndicate was to be entitled to the entire amount of damages upon its payment of the option price. (Ex. 7, p. 13.)

We submit that the inevitable conclusion to be drawn from this array of documentary evidence is that the whole purport and intention of the arrangement was to finance Syndicate's purchase of the bank building. The taxpayer insists that no loan was ever contemplated and that neither Syndicate nor its successor was a mortgagor. But there are other types of security arrangements for financing the purchase of property, the result of which is the same and the tax consequences of which should also be the same. The fact that Syndicate may have forfeited the property upon its failure to keep up the payments and that the arrangement provided no right of redemption does not prove that Syndicate was not purchasing the property. It merely shows that Syndicate was not a mortgagor in the classical sense. Moreover, it is interesting to note that in 1933, when Syndicate became unable to keep up its annual payments, the property was not in fact forfeited, and ultimately, after its tax free reorganization in 1944, Syndicate's successor, the taxpayer, did acquire the legal title as contemplated from the beginning.

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pledgor or mortgagor is personally obligated to pay the debt. *Woodsam Associates* v. *Commissioner,* 198 F. 2d 357 (C.A. 2d); *Prater* v. *Commissioner,* 273 F. 2d 124 (C.A. 5th); *Commissioner* v. *H. F. Neighbors R. Co.,* 81 F. 2d 173 (C.A. 6th).

The taxpayer's answer to this documentary and stipulated evidence tending to show that the whole purport of the transaction was a purchase of the property by Syndicate is that the parol testimony of three witnesses is to the contrary, and that in any event, these documents are not evidence of the intent of the trustee. This Court has displayed a wariness of relying on parol testimony in cases of this kind (*Robinson* v. *Elliott, supra*), and the trial court also was reluctant to afford it reliance here. (R. 28-29.) The trial court did not consider it convincing in the light of the documentary evidence, and was obviously not obliged to credit it. *Hann* v. *Venetian Blind Corp.*, 111 F. 2d 455, 460 (C.A. 9th); *Midland Ford Tractor Co.* v. *Commissioner,* 277 F. 2d 111, 115 (C.A. 8th); *Winters* v. *Dallman,* 238 F. 2d 912, 914 (C.A. 7th); *Anderson* v. *Commissioner,* 250 F. 2d 242, 246-248 (C.A. 5th), certiorari denied, 356 U.S. 950; *Associated Press* v. *KVOS,* 80 F. 2d 575 (C.A. 9th). Here the taxpayer relies upon the self-serving testimony of its present president, the gist of which was that, although the corporate minutes show that Syndicate was buying the property in 1927, those minutes and all the other documents so indicating are erroneous. The witness testified (R. 103) that A. R. Watzek, president of Building Syndicate, "never had any idea that we owned this property or that we had had a liability * * * "; But A. R. Watzek was not called by the taxpayer to testify. The testimony of William L. Brewster, secretary-treasurer of the taxpayer, was wholly innocuous.

The taxpayer further argues that the documents in evidence at most show only Syndicate's unilateral intention, and not that of the trustee. (Br. 20.) But the taxpayer did not submit any documents showing how the trustee treated the transaction on its books. Amis C. Coney, who was a vice-president of the trustee at the time of the transaction, testified that there was no indebtedness on the part of Syndicate; but this is no substitute for the trustee's records showing how it treated the transaction. The witness stated that Syndicate did not have a mortgagor's right of redemption (R. 120); we have already pointed out that this was not a mortgage in the classical sense, and not every purchase of property by means of a security transaction need involve all the characteristics of a classical mortgage. It is obvious, as the witness testified (R. 118-119), that the trustee held the fee title and that Syndicate was not required to exercise its option. None of this vitiates the basic and elementary facts that the whole transaction was undertaken pursuant to the exercise of an option to buy held by Syndicate—not by the trustee—and that the trustee was a party to the lease which itself represents strong evidence of the intention of the parties that Syndicate was buying the property. Furthermore, it is a great deal more indicative of the trustee's intention and understanding of this transaction that neither it nor the holders of the certificates claimed any deduction for depreciation of this building in the years after 1927. Obviously the Internal Revenue Service would have not allowed such depreciation both to Syndicate and the trustee.

The taxpayer also argues that at every instance where the trustee had an opportunity to evidence its intent, it took the position that the transaction was not a mortgage and that Syndicate was merely a lessee. In support of this it cites a request in 1938 that the Syndicate's balance sheet be changed to show that Syndicate held a leasehold. (Br. 21.) Exhibit 16 shows, however, that on its balance sheet of June 30, 1938, Syndicate continued to carry in its asset column the "Land at Cost" in the amount of $1,099,-733.07, and the "Building at Cost less Reserve for Depreciation of $325,733.60" in the amount of $767,-666.40 (representing a total undepreciated cost of $1,093,400). Perhaps Syndicate changed the title of the column; but the substance of it remained that the land and the building were assets belonging to Syndicate.

Syndicate and its successor, the taxpayer, clearly had a capital investment in the building. That capital investment having been depreciated since 1927, the taxpayer plainly cannot add to its depreciated basis an amount paid merely in satisfaction of its indebtedness.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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FEBRUARY, 1961.

No. 17037

United States
COURT OF APPEALS
for the Ninth Circuit

BUILDING SYNDICATE CO.,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon.

HONORABLE JOHN F. KILKENNY, Judge.

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INTRODUCTION

The appellee's brief is helpful in one respect: it points up sharply the principal differences between appellant and appellee in this case. Those differences can be grouped generally under three headings:

1. Appellee believes that the Supreme Court case of *Helvering* v. *F. & R. Lazarus & Company,* 308 U.S. 252, 60 S. Ct. 209 (1939), requires a holding for appellee.

2. Appellee asserts that it was the intention of both Syndicate and Union Trust Company that the land trust arrangement should make Syndicate the owner rather than the lessee of the property.

3. Appellee argues that appellant will receive a double tax benefit if its position is upheld.

Each of these points will be discussed below.

I

Helvering v. F. & R. Lazarus & Company, 308 U.S. 252, 60 S. Ct. 209 (1939), makes clear that the controlling rule in income tax cases involving the land trust device is a rule of property law. Applied to the instant case that rule requires a holding for appellant.

We are in agreement with appellee in believing "that the instant case is controlled by the general principles announced in *Lazarus.*" (Appellee's Br. 15). We differ in our view of the "general principles" there announced.

The Supreme Court in the *Lazarus* case held that the income tax effects of a land trust arrangement depend on a rule of property law—the "established doctrine that a court of equity will treat a deed absolute in form, as a mortgage when it is executed as security for a loan of money." 308 U.S. 255. Clearly the Supreme Court did not mean that in every land trust transaction the lessee must be treated in substance and for tax purposes as the owner of the property. If it had so intended the Tax Court in the later case of *The Akron Dry Goods Company,* 18 T.C. 1143 (1952), aff'd per curiam 218 F.2d 290 (6th Cir. 1954),

could not have found that the taxpayer there acquired only a leasehold. However, the court in *Akron Dry Goods* correctly recognized that the *Lazarus* case turned on the "facts surrounding the transaction and particularly the testimony of the officers of the taxpayer and of the bank as to their intentions *at the time*. . . ." 18 T.C. 1143, 1147. The same factual distinctions make the holding in *City National Bank Building Company* v. *Helvering*, 98 F.2d 216 (D.C. Cir. 1938), consistent with that in *Lazarus*.

Further, an integral part of the property law concept which the Supreme Court applied is the rule that a deed, absolute in form, will be treated as a security device *only if both parties intended it as security*. See cases cited Appellant's Br. 17. In addition, where the question whether a deed was in fact given as security arises in three-party transactions like the one here involving the seller of the Northwestern Bank property, the trustee, and Syndicate, the courts apply a particularly stringent test stated in Osborne on Mortgages, Sec. 95, p. 226 (1951), as follows:

> "Plainly, in these tripartite cases he who would transform the expressed contract for sale into a different one which is supposed to be hidden by it carries a heavy burden. And the proponent of such a proposition cannot meet it by pointing to the elements which are common both to a contract of sale and to a mortgage."

What is said with respect to contracts of sale applies with even more force to leases with options to purchase.

Appellee compares selected formal details of the lease and declaration of trust in the *Lazarus* case with

the same details in the instruments in the present case and reaches the conclusion that because of the similarity of the documents, the instant case is controlled by *Lazarus* (Appellee's Br. 15, 16). But, of course, as the *Akron Dry Goods* case, supra, demonstrates, these formal details of the instruments cannot be controlling. It is the intent of both the parties—lessee and trustee—which is the touchstone, and it is in the evidence of this intent that *Lazarus* and the instant case are strikingly different, result in the acquisition of different property interests by the respective taxpayers, and so give rise to different results for income tax purposes.

The question of the intent of Syndicate and of Union Trust will be discussed at greater length in the following section of this brief. However, to illustrate the distinction between *Lazarus* and the present case, we note the following substantial factors which are extrinsic to the formal similarities of the documents in both cases and which conclusively differentiate the transaction in *Lazarus* from the one before the court. (These factors in the *Lazarus* case appear in the opinion of the Board of Tax Appeals, 32 B.T.A. 633 (1935).)

1. In *Lazarus* the taxpayer originally constructed and owned the buildings and used them in its business; Syndicate had no prior interest in the property.

2. In *Lazarus* the transaction was a refinancing of an existing mortgage and current debt of the taxpayer; this is not true here.

3. The taxpayer in *Lazarus* was looking for a loan

which was offered to it by the trustee; Syndicate neither applied for nor was offered a loan.

4. In *Lazarus* the property was conveyed to the trustee by the taxpayer; here the property was sold to the trustee by a third party.

5. It was the undisputed testimony in *Lazarus* that the taxpayer desired to obtain a long-term loan on the security of its real property; in the present case the undisputed testimony is directly to the contrary.

6. In *Lazarus* the representative of the trust company testified that he did not consider that it was buying the property but that it was making a loan. In this case the testimony of the representative of Union Trust Company was directly to the contrary.

7. In *Lazarus* the taxpayer was not given the right to mortgage its interest; here Syndicate had the right to mortgage its leasehold and did so to secure a bond issue sold to the public.

The enumerated circumstances in the *Lazarus* case are all extrinsic to the formal documents and, as the Supreme Court said, called for application of the property law "doctrine—here controlling—of looking to extrinsic evidence behind a transfer aboslute on its face to determine whether only a security transaction was contemplated by the parties." 308 U.S. 252, 255. The circumstances in *Lazarus* were of a nature which supported classification of the transaction as a mortgage under well-established principles of law. The direct testimony of both parties that they considered the transaction

to be a mortgage would by itself ordinarily be conclusive of the question. As we have seen, none of these circumstances were present in the instant case.

By conveniently overlooking the other six factual differences listed above, appellee erroneously states that the only difference between the instant case and *Lazarus* is the factor listed as Item 3, namely, that in *Lazarus* the property was conveyed to the trustee by the taxpayer and here the property was sold to the trustee by a third party (Appellee's Br. 16). But appellee has also erred in failing to recognize the significance of this particular difference in the facts.

In *Lazarus* the taxpayer already owned the property and had a tax basis for it. The question was whether under the land trust arrangement the taxpayer had recovered that basis through a sale to the trustee so that he had nothing left to depreciate, or whether he had simply borrowed money on the property leaving his depreciation basis unaffected. Here, since Syndicate had no prior interest in the property a different question is presented, i.e., did Syndicate purchase an interest in depreciable property, or did it purchase a leasehold.

Stated another way, it was relatively easy for the court in *Lazarus* to decide that the pre-existing interest of the taxpayer in depreciable property was not changed by the land trust arrangement. However, to hold that Syndicate acquired a depreciable interest in the Northwestern Bank property it would be necessary to find that the land trust transaction created in Syndicate an interest which it had never owned before and one which the parties never intended it to have.

Finally we come back to the point made in appellant's opening brief, pp. 12, 13, that the District Court's misinterpretation of the *Lazarus* case led it into an error of law in its view that under some doctrine of ownership for "tax purposes"—independent of property law rules—Syndicate should be treated as the owner "for income tax purposes." As described above, the *Lazarus* decision is based on the property law rule that extrinsic evidence may be relied upon to prove a deed absolute to have been a security device. The evidence in *Lazarus,* such as that detailed above, showed the transaction to have been intended as a secured loan. Very different evidence in the Northwestern Bank transaction shows Syndicate to have been purely a lessee.

II

Syndicate acquired only what it bargained for and what Union Trust Company intended to give it: a leasehold with option to purchase, not ownership subject to an indebtedness.

(a) *Syndicate's financial resources permitted it to obtain only a leasehold.*

Appellee's argument under Parts C and D (Appellee's Br. 21-32) is an attempt to remake the Northwestern Bank transaction into something which the parties never intended it to be—indeed, into the kind of transaction which Syndicate found it could not accomplish in 1927.

Appellant is not insisting "that the court must take the taxpayer's name for its relationship to the property

at face, and determine the consequences on that basis." (Appellee's Br. 22). Appellant does insist that the limited rights of a lessee, which were all that Syndicate's slender financial resources enabled it to acquire in the property in 1927, cannot now be transmuted into the rights of an owner with all the differing income tax consequences which attach to ownership. Far from exalting form over substance as appellee complains, appellant insists that the true substance of what it acquired—a leasehold—be given recognition.

Let us go back again to the situation confronting Syndicate's promoters in 1927. They realized that with their limited capital of $300,000 they could not acquire ownership of the Northwestern Bank property by borrowing the balance of the purchase price (R. 74, 107). They could, however, get a foothold on the property by having a trustee for land trust certificate holders acquire it and grant them a 99-year leasehold which they could mortgage to raise additional funds. By including in the lease an option to purchase they had the possibility of enlarging their leasehold to a fee interest if the building's earnings were sufficient. As a price for being able to take only the limited interest of a lease in the property, Syndicate subjected itself to the hazards of cancellation of the lease and immediate dispossession with no right of redemption.

Appellee says that "the whole transaction was set in motion by Syndicate . . . and that its intention was to buy the property." (Appellee's Br. 25). There is no doubt that Syndicate's promoters were the energiz-

ing force in the transaction, but the record is clear that they knew that they could not finance the purchase of the property (R. 74). They had to content themselves with "second best," the acquisition of a leasehold and the possibility that Syndicate could accumulate earnings enough to exercise the option to purchase. References in its minutes to "purchase" of the property were, in fact, the over-exuberant language of the promoters. The confused, inconsistent, and changing classification of its interest in the property in its book entries and audit reports is attributable to its accountant's lack of familiarity with land trust arrangements which were new to Oregon (R. 113).

(b) *Discussion of Oesterreich and Elliott cases.*

Appellee contends strongly that the cases of *Oesterreich* v. *Commissioner of Internal Revenue,* 226 F.2d 798 (9th Cir. 1955), and *Robinson* v. *Elliott,* 262 F.2d 383 (9th Cir. 1958), require a holding that Syndicate was the owner rather than the lessee of the property. In the *Oesterreich* case, on the authority of which the *Elliott* case was decided, this court phrased the test as to whether a document called a lease was to be treated as a contract of sale as follows (226 F.2d 802):

> "We must look, therefore, to the intent of the parties in terms of what they intended to happen."

Applying this test, it is appellant's position that Syndicate obtained, and Union Trust Company intended to give it, only the interest that Syndicate's limited capital would buy—a leasehold plus an option which gave Syndicate a hope of some day acquiring the fee.

This court was careful to distinguish the *Oesterreich* case from those in which "the option price constituted full consideration for the premises or goods acquired" and in which "it was always questionable whether or not the options would be exercised." 226 F.2d 798 at 802, 803. The purchaser, Wilshire, in *Oesterreich* "would not have agreed to the 'lease' unless it provided that title would vest in Wilshire," id. at 803. In the present case Syndicate realized its finances permitted it to acquire only a leasehold in the property, and both it and the trustee realized it was always questionable whether or not the option would be exercised (R. 106, 119).

As for the *Elliott* case the facts there were far different from those in the case at bar and pointed irresistably to the conclusion that the transaction was intended to be a sale, not a lease. The lease term there was ten years; here it was 99 years. The annual net return on the option price in *Elliott* was stated by this court to be 25.33 per cent. Here the annual rent amounted to a normal return of approximately 5 per cent of the option price. In *Elliott* the purported lessee, in the exercise of sane business judgment, could not have entered into the arrangement except on the theory it was buying the property. In the present case the arrangement provided every prospect of a normal profit for both Syndicate and its lessor whether or not Syndicate exercised the purchase option.

(c) *Representations to the public that Syndicate had only a leasehold.*

Particularly noteworthy is the fact, omitted by appellee in its brief, that where the rights of third parties

were involved, Syndicate and Union Trust Company were careful to state precisely the rights which Syndicate acquired in the Northwestern Bank transaction. To finance its acquisition of a leasehold, Syndicate had to sell to the public $750,000 of first mortgage leasehold bonds (R. 15, 64). That mortgage (Ex. 8) accurately describes Syndicate's interest as a leasehold, and if the trustee and Syndicate had secretly intended to create a different type of interest in Syndicate, their misrepresentation to the public which bought the leasehold bonds would have subjected them to severe liability for fraud on the bondholders.

The rights of the public were also involved in the representations made in the marketing of the land trust certificates and here again Syndicate and Union Trust Company were careful to disclose the nature of the transaction. In the record of this case are a booklet entitled "The Land Trust Certificate Analyzed for Investors" (Ex. 17), distributed by George W. York & Co., one of the underwriters of the Northwestern Building Site Land Trust Certificates, and a prospectus relating to the certificates issued by Union Trust Company (Ex. 3). Each of these documents represents that the certificates are shares of equitable ownership in fee simple title to the property, with the lessee corporation owning a 99-year leasehold.

The existence of these representations to the public —land trust certificate holders and purchasers of leasehold bonds—obviously made the present case very different from the *Oesterreich* and *Elliott* cases, supra. In those cases it was not difficult to find that the private

intentions of the parties—no third-party rights being involved—were not correctly expressed by the formal nomenclature used in the documents.

(d) *That the trustee intended Syndicate to have a leasehold interest is indisputable.*

Appellant has contended throughout this brief and its opening brief that under the *Lazarus* rule a land trust transaction will be held to be a security device with the trustee in the position of a creditor only where the evidence shows that *both* parties intended this result. Appellee has been unable to offer more than feeble and easily refutable arguments that such an intention existed on the part of Union Trust Company (Appellee's Br. 31, 32). For example, appellee complains that the taxpayer failed to submit documentary evidence of how the trustee treated the transaction on its books. However, the record shows that Union Trust Company failed in the depression year of 1933 and thereafter its affairs were closed out by a conservator or liquidator (R. 134). In these circumstances the taxpayer's inability to submit Union's books is easily understood. Indeed, in view of the 32 years which elapsed between the Northwestern Bank transaction in 1927 and the trial in 1959, it is fortunate that Mr. A. C. Coney, Vice President and representative of Union in the negotiations, was alive and available to testify. His testimony, as a disinterested witness, was unequivocally to the effect that Union did not intend to hold title as a security interest with Syndicate as the equitable owner, but that a true lessor-lessee relationship was intended and put into effect (R. 118, 119).

Appellee has commented on the fact that in 1933 when Syndicate became unable to pay its rent, the property was not in fact forfeited. But it has ignored the testimony that Union Trust Company at that time—as throughout the entire transaction—took action consistent with its position as owner-lessor and proceeded to take steps to cancel the lease. Only by the most strenuous efforts and persuasion was Syndicate able to obtain concessions in the rent payments to permit it to continue in occupancy of the property (R. 106, 107). The plea by Syndicate to the holders of the land trust certificates for relief from the lease burdens was set forth in a letter from Syndicate to the certificate holders dated July 17, 1933 (Ex. 15).

Appellee says that it is indicative of trustee's intention to regard Syndicate as the purchaser of the property that neither it nor the land trust certificate holders claimed a deduction for depreciation on the building (Appellee's Br. 31). But we know of no case, nor has appellee cited any, which would permit the lessor-trustee or its certificate holders to claim depreciation on the building where Syndicate as lessee had the duty to maintain, restore, and replace the building during a lease term extending far beyond the life of the building. Authorities to the contrary are *A. Wilhelm Co.*, 6 B.T.A. 1 (1927); *Terre Haute, Indianapolis & Eastern Traction Co.*, 24 B.T.A. 197, 210-213 (1931), rev'd on other grounds sub nom. *Commissioner of Internal Revenue* v. *Terre Haute Electric Co.*, 67 F.2d 697 (7th Cir. 1933), cert. denied 292 U.S. 624, 54 S. Ct. 629 (1934); G.C.M. 11933, XII-2 Cum. Bull. 52 (1933). So far as the trustee

was concerned, the improvements on the property were not being exhausted. It is apparent that this portion of appellee's argument, based as it is on an erroneous premise, is meaningless.

Lastly, appellee seeks to minimize the effect of the trustee's request in 1938 that the balance sheet presentation of Syndicate's interest in the property in its independent auditor's report be corrected to eliminate the possibility that it might be interpreted as showing that Syndicate had an ownership interest in the property (Appellee's Br. 32). Yet this is the most unmistakable evidence of the trustee's continuing intention and understanding that Syndicate was a lessee—not an owner (Ex. 52-N, pp. 5, 6). Moreover, Syndicate immediately made the requested correction and thereafter its audit reports clearly designated its interest as a leasehold estate (Exs. 16, 52-N, O, P).

The fact is that appellee has been unable to point to any deviation by the trustee from its consistent position—in the form of the documents, in the testimony of its officer, in its representations to the public, and in its actions—that the transaction gave Syndicate only the rights of a lessee in the property.

III

Decision for the appellant will not result in a double tax benefit.

It is of course stipulated that appellant's predecessor claimed deductions on the American Bank Building on the basis of the remaining life of the building rather

than amortizing the cost of the 99-year leasehold which it held (R. 9). However, appellee's insistence that a decision for the appellant will result in a double tax benefit is wholly unwarranted. Appellant contends that it acquired the property in two bites; a leasehold in 1927 and the lessor's reversion in 1945 upon exercise of the option to purchase. It is undisputed that in this view of the transaction appellant is entitled to include in its basis the unamortized balance of the cost of its leasehold ($444,195.80 as of December 31, 1944, R. 9) plus the purchase price paid in 1945 ($1,417,500, R. 8). Nor is there any dispute as to the allocation of $1,000,-779.96 of the total basis as the basis of the building (R. 9). This amount, adjusted for depreciation to October 31, 1945, is the agreed basis of the building ($986,-430.78, R. 10) if appellant is correct in its contention that it acquired the property in two bites.

The real issue in the case, then, is whether appellant did acquire the property in two bites. If it did, there cannot possibly be a double tax benefit because every dollar of depreciation deducted by appellant's predecessor has been applied to reduce the unamortized portion of its leasehold cost and, therefore, to reduce appellant's present basis for the property. The aggregate amount of all deductions claimed from 1927 through October 31, 1945 ($549,215.08, R. 10) has been eliminated in arriving at the agreed basis of $986,430.78, although $274,784.49 of these deductions did not result in *any* tax benefit to appellant or its predecessor, and never will (R. 10). (We use the term "tax benefit" in the generally accepted sense that no benefit arises from

a particular deduction where other allowable deductions exceed gross income. See 3A Mertens, Law of Federal Income Taxation, Sec. 21.231 (rev. ed. 1958).) The amount originally paid by appellant's predecessor for its leasehold was $952,133.07 (R. 6). The amount stipulated as the unamortized balance of leasehold estate as of December 31, 1944 ($444,195.80, R. 9) represents only the original cost of the leasehold less all depreciation deductions to that date ($549,215.08 minus $26,-061.92, or $523,153.16, R. 10) adjusted for minor amounts capitalized as additions and leasehold improvements during the period.

Since the aggregate amount of all deductions claimed by appellant and its predecessor has already been charged against appellant's basis for the building in arriving at the stipulated amount of that basis ($986,-430.78, R. 10), it is apparent that a decision for appellant cannot result in a double tax benefit. No part of the previously deducted depreciation will ever be deducted again and, in fact, $274,784.49 of that amount never has resulted, and never will result, in *any* tax benefit. The resolution of the real issue, whether or not appellant acquired the property in two bites, is only beclouded by spurious arguments about tax benefit.

In light of this analysis, *The Akron Dry Goods Company,* 18 T.C. 1143 (1952), aff'd *per curiam* 218 F.2d 290 (6th Cir. 1954), would be analogous only if the taxpayer there had charged against its claimed 1945 basis for depreciation the whole amount of basis used to establish the 1929 loss on the sale of the property. Of course this was not done. But if it had been done, there

would have been no double tax benefit in that case, just as there is none here.

Appellee cites two cases involving what it calls attempted repudiation of family partnerships (Appellee's Br. 18, 19). However authoritative those cases may be on their own facts, they are not applicable here. They are based on the rule that one who has available to him several lawful alternative forms for doing business, and elects one of them, cannot thereafter revoke his election and claim that the form chosen was a sham or unreal. See *Maletis* v. *United States,* 200 F.2d 97, 98 (9th Cir. 1952), cert. denied 345 U.S. 924, 73 S. Ct. 782 (1953). In each of those cases, the validity of the partnership under state law was admitted. Here, no one, least of all appellant, contends that the lease, the leasehold bonds which were sold to the public, the declaration of trust and the land trust certificates which were sold to the public, were sham or unreal.

We rather think that the real thrust of appellee's contention in this regard is that appellant is estopped to deny the right of its predecessor to claim depreciation on the building. Appellee's reluctance expressly to characterize the defense is understandable since it was not pleaded and therefore is not an issue in the case. Fed. R. Civ. P. 8(c); *Helvering* v. *Salvage,* 297 U.S. 106, 56 S. Ct. 375 (1936). But even if estoppel were before the court, there is a more basic reason why it is inapplicable here. An estoppel may not be predicated upon a mistake of law, particularly where both parties participate. *Helvering* v. *Salvage,* supra; *Hawke* v. *Commissioner of Internal Revenue,* 109 F.2d 946 (9th

Cir.), cert. denied 311 U.S. 657, 61 S. Ct. 11 (1940); *Commissioner of Internal Revenue* v. *American Light & T. Co.,* 125 F.2d 365 (7th Cir. 1942); *Helvering* v. *Schine Chain Theatres,* 121 F.2d 948 (2nd Cir. 1941). Here, both appellee and appellant's predecessor participated in the mistaken legal conclusion that the latter was entitled to depreciation on the building. Furthermore, representatives of appellee made numerous independent investigations, audits and reports, some of which expressed doubt and inconsistency as to the proper tax treatment of the transaction (revenue agents' reports attached to Ex. 50-A; 50-E; 50-K; 50-R). See *Helvering* v. *Schine Chain Theatres,* 121 F.2d at 949, 950. The confusion in the minds of these parties as to the proper tax treatment of this novel transaction is not surprising, in view of the fact that the applicable general rules were not finally settled until the *Lazarus* decision in 1939. As late as 1938, the question whether a lessee under a land trust transaction could recover his investment over the life of the building rather than the term of the lease was still unsettled, quite apart from any thought of treating the transaction as a mortgage. *The Minneapolis Security Building Corporation,* 38 B.T.A. 1220 (1938).

Of course, appellee would have the burden of proving every essential element of the doctrine of estoppel, which it has wholly failed to do. See *Van Antwerp* v. *United States,* 92 F.2d 871, 875, 876 (9th Cir. 1937). In these circumstances, appellant is not estopped or precluded from asserting that its predecessor held only a leasehold interest in the property.

CONCLUSION

For the reasons stated the judgment of the District Court should be reversed.

Respectfully submitted,

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DAVID G. HAYHURST,
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Portland 4, Oregon.

No. 17037

United States Court of Appeals

for the Ninth Circuit

BUILDING SYNDICATE COMPANY, an Oregon Corp.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Oregon.

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—9-30-60

No. 17037

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

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United States Courthouse,
Portland 7, Oregon,

For Appellee.

The United States District Court
for the District of Oregon

Civil No. 9887

BUILDING SYNDICATE CO., an Oregon Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

PRETRIAL ORDER

This cause came on regularly for pretrial conference before the undersigned judge of the above-entitled court on the 4th day of November, 1959. Plaintiff was represented by Thomas B. Stoel, George H. Fraser, and David Hayhurst, its attorneys, and defendant was represented by its attorneys.

Statement of Agreed Facts

The following matters are admitted as to the issues framed by the complaint herein and the answer of the defendant to said complaint, and may be considered as evidence for all purposes:

I.

Plaintiff brings this action to recover from defendant federal income taxes for the calendar year 1953, paid by plaintiff to the District Director of Internal Revenue, Portland, Oregon, and interest.

II.

Jurisdiction is based upon Section 1346, Title 28, United States Code.

III.

Plaintiff is a corporation organized and existing under the laws of the State of Oregon, with its principal place of business in Portland, Oregon.

IV.

In the spring of 1927, the real property then known as the Northwestern Bank Building property was owned by the Northwestern National Bank of Portland (Oregon), a national banking association. Prior to June 21, 1927, the Northwestern National Bank of Portland (Oregon) placed this property in the hands of George N. Black, a real estate broker, for purposes of sale. Also prior to June 21, 1927, George N. Black entered into negotiations with George W. York & Company, Inc., Cleveland, Ohio, relative to financing the sale of the property known as Northwestern Bank Building. These negotiations culminated in a commitment by George W. York & Company, Inc., dated June 21, 1927, as set forth in Pretrial Exhibit 1.

V.

Building Syndicate, an Oregon corporation, was organized on or about August 1, 1927. Copies of the articles of incorporation, the bylaws, and the minutes through page 48 are set forth in the minute book as Pretrial Exhibit 2.

VI.

Some time after June 21, 1927, George W. York & Company, Inc., associated with it The Union Trust Company of Cleveland for the purpose of carrying out its commitment. Pretrial Exhibit 3 is a copy of a prospectus published by The Union Trust Company.

VII.

By deed dated September 16, 1927, the Northwestern Bank Building property was conveyed by Northwestern National Bank, a national banking association, to Security Savings and Trust Company (Portland, Oregon). Pretrial Exhibit 4 is a copy of the deed of conveyance, and Pretrial Exhibit 5 is a copy of an assignment of lease on a small parcel of the property. Under date of August 15, 1927, though actually executed September 30, 1927, Security Savings and Trust Company as trustee and The Union Trust Company (of Cleveland, Ohio) as co-trustee, executed an Agreement and Declaration of Trust between themselves and "The Holders of Land Trust Certificates of Equitable Ownership in the Northwestern Building Site Located in Portland, Oregon, Leased to Building Syndicate (an Oregon corporation)." Pretrial Exhibit 6 is a copy of said Agreement and Declaration of Trust. A lease of the property was entered into between Building Syndicate as lessee and Security Savings and Trust Company, trustee, as lessor, the lease being made as of August 15, 1927, though actually signed September 30, 1927. Pretrial Ex-

hibit 7 is a copy of this lease. Building Syndicate entered into an indenture with Lumbermen's Trust Company made as of September 1, 1927, to secure an issue of $750,000 first mortgage leasehold bonds. Pretrial Exhibit 8 is a copy of this indenture. Payment to the seller for the property and delivery of the above-described documents were effected in a single escrow transaction on September 30, 1927, pursuant to an escrow agreement entered into by Northwestern National Bank, Security Savings and Trust Company, Lumbermen's Trust Company, and Building Syndicate with Title and Trust Company as escrow agent. The escrow agreement has not been located.

VIII.

The Northwestern Bank Building property was conveyed to the trustee for the Land Trust Certificate holders upon payment to the seller of $2,202,133.07. The sources of the funds for payment of the foregoing purchase price by the trustee were as follows:

From trustee for Land Trust Certificate holders (Proceeds of sale of 1,350 Land Trust Certificates of Equitable Ownership)	$1,250,000.00
From Building Syndicate (Proceeds of sale of leasehold bonds and of stock)	952,133.07
	$2,202,133.07

IX.

The name of the property was changed to American Bank Building at the beginning of the year 1928. In 1932, the leasehold bonds of Building Syndicate went into default. A bondholders' committee was organized. In 1933, an amendment to the lease was negotiated with The Union Trust Company of Cleveland which reduced the annual rental from $74,250 to $40,500 plus all of the net earnings received by Building Syndicate from the American Bank Building property up to the amount of the rental required by the original lease, this arrangement to remain in effect for five years. Pretrial Exhibit 9. On the expiration of this lease modification in 1938, a modification for an additional five-year period was negotiated with representatives of The Union Trust Company of Cleveland. Pretrial Exhibit 10.

X.

In 1943, the leasehold bonds of Building Syndicate being still in default, the trustee for the bondholders, at December 31, 1943, acquired the company's assets. On November 9, 1944, a new corporation known as Building Syndicate Co. (plaintiff herein), was organized. The assets of Building Syndicate (old company), including its leasehold on the American Bank Building, were transferred to plaintiff on December 31, 1944, the acquisition of the assets by the trustee and their transfer to plaintiff being a tax-free reorganization under the Internal Revenue Code.

XI.

Article Four of the lease of August 15, 1927 (Pretrial Exhibit 7), granted plaintiff an option to purchase the fee interest in the American Bank Building property from the lessor, upon 60 days' notice, for $1,417,500. Plaintiff exercised this option to purchase on October 31, 1945. The sources of payment of the aforementioned option prices were as follows:

Proceeds of loan to Building Syndicate Co. from Prudential Insurance Company	$1,200,000
Application of 138 Land Trust Certificates held by trustee in depreciation fund pursuant to provisions of lease (at $1,050 per certificate)	144,900
Financed from corporate funds of Building Syndicate Co.	72,600
	$1,417,500

XII.

The total cost of the American Bank Building property was set up on plaintiff's books in the amount of $1,842,023.14. This amount reflects the following adjustments to the option price of $1,417,500:

Purchase price	$1,417,500.00
Add:	
Expenses of purchase	4,441.77

Unamortized balance of leasehold estate per books as of December 31, 1944..		444,195.80
		$1,866,137.57
Less purchase discount on Land Trust Certificates held in depreciation fund	$	24,144.43
Total cost of property per plaintiff's books		$1,842,023.14

XIII.

Plaintiff allocated the foregoing total cost of the property as follows:

Land	$	817,027.29
Building, less Dunham System, elevators, and alterations		1,000,779.96
Dunham System, elevators, and alterations		19,591.33
Leasehold, Parcel B (unamortized)		4,624.56
		$1,842,023.14

XIV.

On their federal income tax returns from 1927 through 1944, plaintiff and its predecessor each year claimed deductions on the American Bank Building on the basis of the remaining life of the building (assumed in 1927 to be 36 years) rather than amortizing the cost of the 99-year leasehold which they held. On its tax return for the year 1945, plaintiff claimed depreciation from January 1, 1945, on the new allocated cost of the building

shown in paragraph XIII based on an assumed life of 32 years from that date. For the ten months' period from January 1, 1945, to October 31, 1945, the depreciation so claimed amounted to $26,061.92. Under these methods plaintiff and its predecessor had claimed deductions through October 31, 1945, in the aggregate amount of $549,215.08. Computed on the basis of amortization over a 99-year life, the aggregate amortization of plaintiff's leasehold as of October 31, 1945, was $172,272.65. The excess of the deductions taken over leasehold amortization was $376,942.43, of which $274,784.49 did not result in tax benefit.

XV.

The net basis to plaintiff at October 31, 1945, of the American Bank Building for purposes of depreciation will be as follows:

(1) If defendant is correct in its contentions:	$ 544,184.92
(2) If plaintiff is correct in its contentions numbered 4 and 5.....	1,137,707.33
(3) If plaintiff is correct in its contention numbered 4 and incorrect in its contention numbered 5:.....	986,430.78

XVI.

A federal income tax return of the plaintiff for the calendar year 1953 was duly filed with the District Director of Internal Revenue, Portland, Oregon. At various dates in the year 1954, and on September 21, 1956, plaintiff made payments ag-

gregating $133,487.32 as and for federal income tax for the calendar year 1953.

XVII.

On October 26, 1956, plaintiff filed with the District Director of Internal Revenue, Portland, Oregon, a claim for refund of overpayment of federal income tax for the calendar year 1953. Thereafter, on July 18, 1957, plaintiff filed an amended claim for refund of overpayment of federal income tax for the calendar year 1953. By a notification dated April 2, 1958, the District Director of Internal Revenue rejected plaintiff's claim for refund of federal income tax for the year 1953 and interest thereon, in the aggregate amount of $23,669.38.

Issues to Be Determined

1. Should the amount paid by plaintiff in 1945 at the time of its exercise of its option to purchase the American Bank Building property be taken into account in computing plaintiff's basis for depreciation of the property?

2. Should plaintiff's basis for the American Bank Building be reduced by the amounts claimed by plaintiff and its predecessor on the American Bank Building in excess of amortization of its leasehold cost to the extent such excess resulted in no tax benefit?

Contentions

Plaintiff contends:

1. As a matter of law the trustee acquired for the benefit of the Land Trust Certificate holders

the entire legal and beneficial interest in the American Bank Building property in 1927, subject only to a leasehold and option to purchase in Building Syndicate.

2. As a matter of law Building Syndicate acquired in 1927 only the interest in the American Bank Building property granted it by the terms of the lease agreement, which is Pretrial Exhibit 7.

3. On October 1, 1945, plaintiff, as successor to the rights of Building Syndicate, exercised the option to purchase contained in the lease agreement. As a matter of law plaintiff thereby acquired the interest previously held by the trustee for the benefit of the Land Trust Certificate holders. Prior to this date, as a matter of law plaintiff and its predecessor held only the rights of a lessee in the property granted under the terms of the lease agreement.

4. The amount paid by plaintiff on exercise of its option to purchase from the trustee must be taken into account in the computation of plaintiff's basis for the American Bank Building property for tax purposes.

5. Amounts claimed by plaintiff and its predecessors as deductions on the American Bank Building in excess of amortization of its leasehold cost (to the extent such excess resulted in no tax benefit) should not be applied to reduce plaintiff's basis for the property for tax purposes.

Contentions of Defendant

1. Building Syndicate (old company) properly claimed ownership of the Northwestern (American) Bank Building for federal income tax purposes; legal title to the building was vested in Security Trust pursuant to a financial plan adopted by the parties in order to secure the funds advanced by the holders of the land trust certificates which Building Syndicate needed in order to exercise its option to purchase this property.

2. The closing agreement executed by Building Syndicate (old company) on February 26, 1929, and accepted by the Secretary of Treasury on or about May 24, 1929, bars Building Syndicate Co. (new company) from changing the basis upon which depreciation was claimed and allowed on the Northwestern (American) Bank Building.

3. Ownership of the Northwestern (American) Bank Building for federal income tax purposes is controlled by the substance of the series of interlocking transactions leading up to execution of the escrow agreement of September 30, 1927, and not by the form of the legal instruments or remedies of the parties as construed and applied by the laws of the forum state.

4. Building Syndicate Co. may not adjust its basis in the Northwestern (American) Bank Building under the so-called tax benefit rule, when it failed to apply this adjustment at the time and in the manner prescribed by law.

Pretrial Exhibits

The parties agree that no further identification of the following pretrial exhibits is necessary and that recording data shown with respect to any exhibit is accurate and may be considered as evidence for all purposes. In the event said exhibits, or any of them, are offered in evidence at the time of the trial, they shall be subject to objection only on the grounds of relevancy, competency, and materiality.

Plaintiff's Exhibits:

1. Letter of George W. York & Co., Inc., to Mr. Geo. N. Black and Strong & MacNaughton Trust Company, dated July 21, 1927.

2. Material set forth in first 48 pages of minute book of Building Syndicate.

3. Copy of prospectus published by The Union Trust Company of Cleveland relating to Land Trust Certificates.

4. Deed from Northwestern National Bank of Portland, Oregon, to Security Savings and Trust Company, recorded in the Deed Records of Multnomah County, Oregon, in Book 1120 at page 230.

5. Assignment of lease from Northwestern National Bank of Portland, Oregon, to Security Savings and Trust Company, recorded in the Deed Record of Multnomah County, Oregon, in Book 1120 at page 231.

6. Copy of Agreement and Declaration of Trust between Security Savings and Trust Company as

Trustee, The Union Trust Company as Co-trustee, and The Holders of Land Trust Certificates of Equitable Ownership in the Northwestern Building Site Located in Portland, Oregon, Leased to Building Syndicate, dated August 15, 1927, and recorded in the Deed Records of Multnomah County, Oregon, in Book 1120 at page 134.

7. Lease dated August 15, 1927, from Security Savings and Trust Company, Trustee, lessor, to Building Syndicate, lessee, recorded in the Deed Records of Multnomah County, Oregon, in Book 1123 at page 10.

8. Leasehold bond indenture between Building Syndicate and Lumbermen's Trust Company made as of September 1, 1927.

9. Supplemental indenture of lease between Security Savings & Trust Company and Building Syndicate made as of May 15, 1933, signed and delivered December 21, 1933.

10. Second supplemental indenture of lease from The First National Bank of Portland to Building Syndicate, dated as of May 15, 1938.

11. Deed from The First National Bank of Portland, trustee, to Building Syndicate Co., dated October 29, 1945, and recorded in the Deed Records of Multnomah County, Oregon, in Book 982 at page 294.

12. Assignment of lease from The First National Bank of Portland, trustee, to Building Syn-

dicate Co., dated October 29, 1945, and recorded in the Deed Records of Multnomah County, Oregon, in Book 982 at page 297.

13. Quitclaim deed from Building Syndicate to Building Syndicate Co., dated February 17, 1945, and recorded in the Deed Records of Multnomah County, Oregon, in Book 908 at page 54.

14. Quitclaim deed from The National City Bank of Cleveland, successor co-trustee, to Building Syndicate Co., recorded in the Deed Records of Multnomah County, Oregon, in Book 1001 at page 323.

15. Printed letter dated July 17, 1933, from Building Syndicate to Holders of Land Trust Certificates.

16. Printed letter dated July 22, 1938, from Building Syndicate to Holders of Land Trust Certificates.

17. Booklet issued by George W. York & Co., Inc., entitled "The Land Trust Certificate Analyzed for Investors."

18. Income bond indenture between Building Syndicate Co. and Portland Trust & Savings Bank, trustee, made as of January 1, 1944.

19. Memorandum of option made as of July 7, 1927, from the Northwestern National Bank of Portland (Oregon) to George N. Black.

20. Memorandum of extension of option made as of August 6, 1927, from the Northwestern Na-

tional Bank of Portland (Oregon) to George N. Black.

Defendant's Exhibits
Offered and Introduced at Trial

50 A through 50 S. Original federal income and excess profit tax returns filed by Building Syndicate for the years 1927 through 1946, inclusive.

51 A through 51 Y. Copies of federal income and excess profit tax returns filed by Building Syndicate for the years 1927 through 1946, inclusive.

52 A through 52 P. Annual report of audit made of the books of Building Syndicate by independent certified public accountants for the years 1927 through 1939, inclusive.

53. Exhibit marked but not offered as evidence.

54 A through 54 F. Ledger sheets taken from the General Journal & Ledger of Building Syndicate.

Defendant's Exhibits

Exhibit No. 50

Original Income Tax Returns for Building Syndicate.

50-A—Corporation Income Tax Return, Year 1927.

50-B—Corporation Income Tax Return, Year 1928.

50-C—Corporation Income Tax Return, Year 1929.

50-D—Corporation Income Tax Return, Year 1930.

50-E—Corporation Income Tax Return, Year 1931.

50-F—Corporation Income Tax Return, Year 1932.

50-G—Corporation Income and Excess-Profits Tax Return, Year 1933.

50-H-1—Corporation Income and Excess-Profits Tax Return, Year 1934.

50-H-2—Corporation Income and Excess-Profits Tax Return, Year 1935.

50-I—Corporation Income and Excess-Profits Tax Return, Year 1936.

50-J—Corporation Income and Excess-Profits Tax Return, Year 1937.

50-K—Corporation Income and Excess-Profits Tax Return, Year 1938.

50-L—Corporation Income and Excess-Profits Tax Return, Year 1939.

50-M—Corporation Income, Declared Value Excess-Profits, and Defense Tax Return, Year 1940.

50-N—Corporation Income and Declared Value Excess-Profits Tax Return, Year 1941.

50-O—Corporation Income and Declared Value Excess-Profits Tax Return, Year 1942.

50-P—Corporation Income and Declared Value Excess-Profits Tax Return, Year 1943 (Tentative return, original First page missing).

50-Q—Corporation Income and Declared Value Excess-Profits Tax Return, Year 1944.

50-R—Corporation Income and Declared Value Excess-Profits Tax Return, Year 1945.

50-S—Corporation Income Tax Return, Year 1946.

Exhibit No. 51

Taxpayer's Copies of Income Tax Returns.

51-A—Corporation Income Tax Return, Year 1927.

51-B—Corporation Income Tax Return, Year 1928.

51-C—Corporation Income Tax Return, Year 1929.

51-D—Corporation Income Tax Return, Year 1930.

51-T—Corporation Income Tax Return, Year 1927.

51-F—Corporation Income Tax Return, Year 1932.

51-G—Corporation Income and Excess-Profits Tax Return, Year 1933.

51-H—Corporation Income and Excess-Profits Tax Return, Year 1934.

51-I—Corporation Income and Excess-Profits Tax Return, Year 1935.

51-J—Corporation Income and Excess-Profits Tax Return, Year 1936.

51-K—Corporation Income and Excess-Profits Tax Return, Year 1937.

51-L—Corporation Income and Excess-Profits Tax Return, Year 1938.

51-M—Corporation Income and Excess-Profits Tax Return, Year 1939.

51-N—Corporation Income, Declared Value Excess-Profits and Defense Tax Return, Year 1940.

51-O—Corporation Income and Declared Value Excess-Profits Tax Return, Year 1941.

51-P—Corporation Income and Declared Value Excess-Profits Tax Return, Year 1942.

51-Q—Corporation Income and Declared Value Excess-Profits Tax Return, Year 1943 (Tentative only).

51-R—Corporation Excess-Profits Tax Return, Year 1943.

51-S—Corporation Income and Declared Value Excess-Profits Tax Return, Year 1943.

51-T—Corporation Income and Declared Value Excess-Profits Tax Return, Year 1944.

51-U—Corporation Income and Declared Value Excess-Profits Tax Return, Year 1941 (Tentative).

51-V—Corporation Excess-Profits Tax Return, Year 1944.

51-W—Corporation Excess-Profits Tax Return, Year 1944 (Tentative).

51-X—Corporation Excess-Profits Tax Return, Year 1945.

51-Y—Corporation Income Tax Return, Year 1946.

Exhibit No. 52

Annual Accounting Reports of Independent Auditors.

52-A—Report of Arch F. Tourtelotte, CPA, as at 9/30/27.

52-B—Report of Chaney, Wood & Co., CPA, Period 10/1/27 to 12/31/28.

52-C—Report of I. D. Wood & Co., Year ended 12/31/29.

52-D—Report of I. D. Wood & Co., Year ended 12/31/30.

52-E—Report of I. D. Wood & Co., Year ended 12/31/31.

52-F—Report of Peat, Marwick, Mitchell & Co., Year ended 12/31/32.

52-G—Report of Peat, Marwick, Mitchell & Co., Year ended 12/31/33.

52-H—Report of Peat, Marwick, Mitchell & Co., Year ended 12/31/34.

52-I—Report of Peat, Marwick, Mitchell & Co., Year ended 12/31/35.

52-J—Report of Peat, Marwick, Mitchell & Co., Year ended 12/31/36.

52-K—Report of Peat, Marwick, Mitchell & Co., Year ended 12/31/37.

52-L—Report of Peat, Marwick, Mitchell & Co., Year ended 12/31/37.

52-M—Report of Peat, Marwick, Mitchell & Co., 6 mos. ended June 1938(6/ /38).

52-N—Report of Peat, Marwick, Mitchell & Co., Year ended 12/31/38.

52-O—Report of Peat, Marwick, Mitchell & Co., Year ended 12/31/42.

52-P—Report of Peat, Marwick, Mitchell & Co., Year ended 12/31/39.

Exhibit No. 54

Selected Pages From General Journal and Ledger of Building Syndicate.

54-A—Typed insert appearing between Pages 26 and 27 of the General Ledger, entitled: "Proposed Depreciation and amortizing entries" as per letter of authorization from President, dated Feb. 9, 1928.

54-B—Ledger—Real Estate Parcel A.

54-C—Ledger—Leasehold Parcel B.

54-D—Ledger—Building, American Bank.

54-E—Ledger—Sinking Fund, Land Trust Certificate.

54-F—Ledger sheet entitled, "Land Trust Certificates."

54-G—Ledger Sheet entitled, "Purchase Option, Parcels A & B."

54-H—Ledger Sheet entitled, "Lease Rental."

54-I—General Journal, Pages 144-145, December, 1929.

Jury trial is waived by both parties.

It Is Hereby Ordered that the foregoing pretrial order shall not be amended except by the consent of the parties or to prevent manifest injustice and that the said pretrial order supersedes all pleadings; and

It Is Further Ordered that upon the trial of this cause no proof shall be required as to matters of fact hereinabove specifically admitted, but that other proof upon the issues of fact and law as hereinabove stated may be had.

Dated at Portland, Oregon, this 4th day of November, 1959.

/s/ JOHN F. KILKENNY,
District Judge.

Approved:

/s/ THOMAS B. STOEL,
Of Attorneys for Plaintiff.

/s/ H. L. BIGGS,
Of Attorneys for Defendant.

[Endorsed]: Filed November 4, 1959.

[Title of District Court and Cause.]

OPINION

January 15, 1960

Kilkenny, Judge:

This is an action by plaintiff to recover from defendant certain income taxes paid by plaintiff.

In 1927 certain real property in Portland, Oregon, was owned by Northwestern National Bank of Portland[1]. Prior to June 21, 1927, Northwestern placed this property in the hands of a real estate broker for sale. Prior to that time, this broker had negotiated with George W. York & Company, Inc.,[2] of Cleveland, Ohio, relative to financing the sale of the property. These negotiations culminated in a com-

---

[1]Herein called Northwestern.

---

[2]Herein called York.

mitment by York dated June 21, 1927. Building Syndicate[3], an Oregon corporation, was organized on August 1, 1927. Subsequent to June 21, 1927, York associated with it the Union Trust Company of Cleveland[4] for the purpose of carrying out its commitment. By deed dated September 16, 1927, Northwestern conveyed said property to Security Savings & Trust Company[5] (Portland, Oregon). On September 30, 1957, Security and Union, as co-trustees, executed an agreement and declaration of trust between themselves and "the holders of land trust certificates of equitable ownership in the Northwestern building site located in Portland, Oregon, leased to Building Syndicate (an Oregon corporation)." On September 30, 1927, Security leased to Syndicate the property involved for a period of 99 years. As of September 21, 1927, Syndicate entered into an indenture with Lumberman's Trust Company[6] to secure an issue of $750,000 first leasehold bonds. Payment to the seller for the property and delivery of the above-described documents were effected in a single escrow transaction on September 30, 1927, pursuant to an escrow agreement entered into between Northwestern, Security, Lumberman's and Syndicate, with Title & Trust Company as escrow

[3]Herein called Syndicate.

[4]Herein called Union.

[5]Herein called Security.

[6]Herein called Lumberman's.

agent. The Northwestern property was conveyed to the trustees, Union and Security, for the benefit of the land trust certificate holders upon payment to the sellers of $2,202,133.07, the sources of these funds being:

From trustee for Land Trust Certificate holders (proceeds of sale of 1,350 Land Trust Certificates of Equitable Ownership	$1,250,000.00
From Building Syndicate (proceeds of sale of leasehold bonds and of stock)	952,133.07
	$2,202,133.07

In 1928 the name of the property was changed to American Bank Building. In 1932 the leasehold bonds of Syndicate went into default and a bondholder's committee was organized. In 1943, the bonds being still in default, the trustee for the bondholders acquired the company's assets on December 31st of that year. On November 9, 1944, a new corporation known as Building Syndicate Co.,[7] the plaintiff herein, was organized. The assets of Syndicate, including its lease on the bank property, were transferred to the new company on December 31, 1944, the acquisition of the assets by the trustee and their transfer to plaintiff being a tax free reorganization under the Internal Revenue Code. The lease contained an option to purchase the fee interest of the property from the lessor upon written notice. Plain-

[7]Herein called new company.

tiff (new company) exercised this option to purchase on October 31, 1945, the sources of payment of the aforementioned option price being as follows:

Proceeds of loan to Building Syndicate Co. from Prudential Insurance Company	$1,200,000
Application of 138 Land Trust Certificates held by Trustee in depreciation fund pursuant to provisions of lease (at $1,050 per certificate)	144,900
Financed from corporate funds of Building Syndicate Co.	72,600
	$1,417,500

On their federal income tax returns from 1927 through 1944, the plaintiff and its predecessors claimed depreciation deductions on the bank building each year on the basis of the remaining life of the building,[8] rather than amortizing the cost over the 99 year leasehold period. On its tax return for the year 1945, plaintiff claimed depreciation from January 1, 1945, on the new allocated cost of the building based on an assumed life of 32 years from that date. For the ten months' period from January 1, 1945, to October 31, 1945, the depreciation so claimed amounted to $26,061.92. Under these methods plaintiff and its predecessor had claimed deductions through October 31, 1945, in the aggregate amount of $549,215.08. Computed on the basis of amortization

[8]Assumed in 1927 to be 32 years.

over a 99-year life, the aggregate amortization of plaintiff's leasehold as of October 31, 1945, was $172,272.65.

On the income tax returns filed by the new company, it adjusted the cost basis of the property by adding the amount paid to redeem the land trust certificates and claimed a deduction for depreciation computed on the basis of this adjustment. To the extent the deductions thus claimed represented an amount for depreciation already allowed or allowable to Syndicate (old company) in its prior income tax returns, the Commissioner of Internal Revenue disallowed the deduction and assessed a tax deficiency. It is this deficiency which the plaintiff attempts to recover in this case.

Simply stated, the issue in this case is: Whether Syndicate properly claimed and was allowed an income tax deduction for depreciation on the American Bank Building (formerly Northwestern Bank Building) during the years 1927 through 1943 computed on the basis of the total purchase price paid to the original vendors of the property. The answer to the question is solved by determining whether Syndicate, during such years, should be treated as the owner, for tax purposes, of the building in question.

The corporate income and excess profit tax returns of Syndicate show that it regarded itself as the owner of the building during the years in question and that it claimed and was allowed an annual

deduction for depreciation on the basis of such ownership. This method of reporting was used after examination and discussion by and with the Internal Revenue Service and most of the reports were filed after a final closing agreement was executed by Syndicate and the Revenue Service. These returns indicate that the amount received from the sale of the land trust certificates was regarded as a corporate liability of Syndicate and that the land and building were a corporate asset. The annual accounting reports of Syndicate consistently showed that it regarded itself as the owner of the bank building. These reports show the trust certificates as a corporate liability and one of these reports affirmatively stated that legal title was vested in the trustee merely as a method for financing the purchase of the building. Likewise, the minutes of the meetings of the stockholders and of the board of directors, and the financial records of Syndicate, very definitely show that it regarded itself as the owner of the bank building and that the land trust certificates were liabilities on which interest was paid and accrued. It is unnecessary to point to other documentary evidence which, with the above, conclusively shows that Syndicate regarded itself as the owner of this building.

The construction against interest, in a tax case, by a party to a contract is strong evidence of its meaning. Natco Corporation vs. United States, 3 Cir., 1956, 240 F. 2d 398, 403; Cutting vs. Bryan, 9 Cir., 1929, 30 F. 2d 754. Plaintiff urges that the

testimony of the witnesses at the time of the trial overcomes the action of Syndicate from 1927 through 1943, inclusive. The principal witnesses testified to an intention which would be directly opposed to the action taken by the directors of all interested groups. Furthermore, this testimony would be in direct conflict with what I consider a proper construction of the instruments signed by the respective parties. A witness' statement concerning intention does not weigh heavily against facts directly to the contrary. Flynn vs. Crume, 7 Cir., 1939, 101 F. 2d 661.

Aside from the documentary evidence above-mentioned, the lease itself and the declaration of trust show that all parties to the transaction regarded Syndicate, not the trustees, as the real owner of the building. We call your attention to the following: Article IV of the Declaration of Trust, provides, among other things, for a depreciation fund, over which Syndicate had complete control if it so desired. This fund was connected with the right of Syndicate to exercise the option so that the entire fund could be used by Syndicate at any time it desired. Syndicate could ask for a transfer at any time into this depreciation fund of all of the land trust certificates, upon payment of $1,050.00 each. If such a thing would happen, the entire fee of the property would necessarily belong to Syndicate, in that there would be no other beneficiary of the trust. This trust agreement further provides that in the event of an exercise of the option given to Syndi-

cate under the lease, any and all amounts which were in the depreciation fund should be credited on the purchase price. The lease was for a period of 99 years, renewable forever. The rental was fixed at 5½% of the principal amount advanced and remained so fixed, irrespective of future contingencies or change in the values of the real property. The lease provided that if the property was appropriated to public use, such appropriation constituted an election by the lessee to purchase the property and if the appropriation was only partial, that there would be no reduction or abatement in the amount of rent paid. The lessee insured the property and the lessee was to receive the difference between the insurance proceeds and the cost of restoration in the event of any casualty.

I am of the opinion that this case is controlled by the general principles announced in Helvering, Commissioner, vs. Lazarus, 308 U.S. 252. In that case, on documents and a state of facts quite similar to those above recited, the United States Supreme Court held that the transaction between the taxpayer and the trustee bank, in form a transfer of ownership with a lease back, was in truth and in fact a loan secured by the property involved and that the taxpayer should be treated as the owner of the property for all tax purposes, including depreciation. Counsel for plaintiff cite a good many cases on when the court should consider the transaction a mortgage, rather than a transfer of ownership. Such cases are not controlling under this

factual situation. The government is not contending that the transaction created a mortgage. Plaintiff relies on City National Bank Bldg. Co. vs. Helvering, D.C., 1938, 98 F. 2d 216; The Akron Dry Goods Co. vs. Commissioner, 18 T.C. 1143. Although counsel argue otherwise, I feel that the benefit of City National to plaintiff's position was destroyed by the decision of the Supreme Court in the Lazarus case. The Supreme Court, in its decision in Lazarus, calls attention to the fact that it granted certiorari by reason of the fact that a different result was reached in City National than in Lazarus. The Court then proceeded to affirm the decision of the Board of Tax Appeals in Lazarus. Therefore, I consider Lazarus to be the law on this case.

The Akron Dry Goods Co. vs. Commissioner, supra, is of no help to the plaintiff. As a matter of fact, the decision in Akron actually supports the position of defendant in this case. I quote from the Tax Court opinion:

"* * * In treating the transaction as a sale in July, 1928, resulting in a deductible loss the petitioner realized a substantial income tax benefit for the fiscal year 1929. Thereafter, the properties were not carried on petitioner's books as capital assets and thus were not taken into account in a question involving petitioner's insolvency in the subsequent taxable year 1936, hereinafter discussed.

"The record herein does not support a conclusion that the July, 1928, transaction cast in the form of a

sale, was, in equity, a mortgage as contended by petitioner. Furthermore, now to correct for the purpose of a climaxed tax deduction benefit in the taxable year 1945 an alleged mistake, but actually an inconsistent position, which resulted in the petitioner's election to take tax deduction benefit in the taxable year 1929—a year as to which any adjustment is barred by the statute of limitations—would be contrary to the established principle of not allowing a double tax benefit. Robinson vs. Commissioner, 181 F. 2d 17, affirming 12 T.C. 246. Cf. Wheelock vs. Commissioner, 77 F. 2d 474, affirming 28 B.T.A. 611."

Clearly, the decision in the Akron case is in full accord with the government's position in this court.

I hold that Syndicate was the owner of the bank building during the years in question. Counsel for defendant will prepare findings and judgment in conformity with this opinion.

[Endorsed]: Filed January 15, 1960.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. This is an income tax case brought by Building Syndicate Company to recover taxes paid for the calendar year 1953 in the amount of $23,669.38.

2. Building Syndicate Company maintains that they should be allowed to take additional depreciation deductions on certain real estate owned by them.

3. The real estate in question is a building, which in 1927 was owned by Northwestern National Bank of Portland. During the year 1927, Northwestern Bank offered this building for sale through a real estate broker. This broker, George N. Block, paid $10,000 for an option to purchase this property for approximately $2,200,000.

4. In order to facilitate the sale of the building, the real estate broker secured a financial commitment from an Eastern concern whereby they would underwrite an issue of land trust certificates in the amount of $1,350,000.

5. Building Syndicate, an Oregon corporation, was organized on August 1, 1927, with an authorized capital of 7,500 shares of no par common stock. This stock was subscribed at $40 per share or an aggregate of $300,000. George N. Block transferred to Building Syndicate his option to purchase the bank property in payment of $10,000 on his subscribed stock.

6. The directors of Building Syndicate negotiated a commitment with the Lumbermen's Trust Company to underwrite $750,000 of leasehold bonds to be issued by Building Syndicate.

7. The directors of Building Syndicate agreed that the building here in question be held in trust

by Security Savings and Trust Company of Portland, and Union Trust Company of Cleveland, Ohio. The trustees were to issue a lease to the Building Syndicate. This lease provided for a term of 99 years renewable forever. The purchase of the building and the necessary agreements were approved at a special meeting of the board of directors of Building Syndicate on September 19, 1927. The minutes of the board of directors state:

"There was thereupon presented to the Board for consideration a form of escrow agreement, dated as of September 19, 1927, proposed to be executed by Northwestern National Bank, Security Savings and Trust Company, Building Syndicate, Lumbermen's Trust Company and a local bank to be named hereafter (said bank when named to act as agent for Northwestern Mutual Life Insurance Company, holder of a present mortgage on the Northwestern Bank Building property), said escrow being directed to Title and Trust Company, and setting forth in detail the amounts of money to be paid by this company for the purchase of said Northwestern Bank Building property, and the amounts of money to be received by this company from the purchasers of the 1350 land trust certificates, the issue of which has been hereinbefore authorized, and to be received from Lumbermen Trust Company for the purchase of the $750,000.00 par value first mortgage leasehold bonds of this company, a copy of said escrow agreement being hereinafter set forth as Exhibit 'D' to the minutes of this meeting.

"On motion duly made and seconded, it was unanimously

"Resolved, that the President of this company execute in the name of this company and as its act and deed said escrow agreement.

"Resolved Further, that the President and Secretary of this company be and they hereby are authorized and empowered to deliver to Title and Trust Company, as escrow holder, all of the instruments provided to be delivered to it under the terms of said escrow agreement.

"Resolved Further, that said officers be and they hereby are authorized and empowered to consummate all sales of securities, execute and deliver all documents, receive all considerations for the sale of securities, and make all payments to Northwestern National Bank provided to be made by the terms of said escrow, and to do and perform all other acts required to be done by this company in order to effect the purchase of said Northwestern Bank Building property in time and manner as is provided for by the terms and conditions of said declaration of trust, Exhibit 'A,' said lease, Exhibit 'B,' said mortgage, Exhibit 'C' and said escrow agreement, Exhibit 'D.'

"There being no further business to be transacted, the meeting adjourned."

8. The terms of the escrow agreement were executed about September 30, 1927. The board of directors of Building Syndicate changed the name of

the property from the Northwestern Bank Building to the American Bank Building in 1928.

9. The property was conveyed to the trustees, for the benefit of the land trust certificate holders upon payment to the sellers of $2,202,133.07. The sources of these funds were:

From Trustee for Land Trust Certificate Holders (Proceeds of sale of 1,350 Land Trust Certificates of Equitable Ownership)	$1,250,000.00
From Building Syndicate (Proceeds of leasehold bonds and stock)	952,133.07
	$2,202,133.07

10. The corporate income tax returns filed by Building Syndicate stated that their business was as follows:

Years	Business
1928 through 1931	Owns and Operates Office Building
1932 through 1935	Building Ownership
1936 through 1942	Building Owner
1943	Operator of Office Building

11. Through all the years 1927-1943 the Building Syndicate claimed and was allowed a deduction for depreciation based on a useful life of 36 years and computed on entire cost of the building.

12. The financial statements of the Company, as furnished with the income tax returns for all years

1927-1943, listed this property as a corporate asset and the land trust certificates and leasehold bonds as corporate liabilities. The annual accounting reports, prepared by independent accountants, consistently showed that Building Syndicate regarded itself as the owner of the bank building.

13. In 1932 the leasehold bonds of Building Syndicate were in default and a bondholder's committee was organized. In 1943 the bonds were still in default and the trustee of the bondholders foreclosed on Building Syndicate on December 31, 1943.

14. On November 9, 1944, a new corporation known as Building Syndicate Company was organized. This corporation is the plaintiff in this action. All the assets, including the lease on the bank building, were transferred from the trustee of the bondholders to the new corporation on December 31, 1944. The acquisition of the assets by the trustee and their transfer to plaintiff were pursuant to a tax-free reorganization under the Internal Revenue Code.

15. The original lease issued to Building Syndicate contained an option in favor of Building Syndicate whereby they could purchase the fee title from the lessor upon written notice. The trust agreement with the trustee also contained the provisions for acquisition of the fee title by Building Syndicate.

16. Plaintiff, pursuant to the option paid the required sums to the trustee and acquired title to the

property on October 31, 1945. The funds for such purchase were derived as follows:

Proceeds of loan from Prudential Insurance Co. to Building Syndicate Co.	$1,200,000.00
Application of 138 Land Trust Certificates held by Trustee in depreciation fund pursuant to provisions of lease (at $1,050 per certificate)	144,900.00
From Building Syndicate Co. corporate funds	72,600.00
	$1,417,500.00

17. Depreciation claimed by plaintiff's predecessor through October 31, 1945, amounted to $549,215.08. If depreciation had been computed on the basis of a 99-year life the depreciation would only have amounted to $172,272.65.

18. On retirement of the land trust certificates the new company made an adjustment to the basis of the building. The undepreciated balance of the building cost was added to the amount paid in retirement of the land trust certificates and the total was reallocated among the land and building.

19. The retirement of the land trust certificates was equivalent to refinancing a loan and had no effect on the basis of property owned by the company.

20. During the years 1927 through 1943, Building Syndicate, for income tax purposes, was the owner of the property in question. Building Syndicate properly computed the depreciation allowance for this property based on the total purchase price of the depreciable building.

21. The basis for depreciation in the new company is the same as it was in the old.

Conclusions of Law

1. The Court has jurisdiction of the parties and of the subject matter of this action.

2. That plaintiff has failed in its burden of proof to establish its contentions and that defendant is entitled to judgment in its favor dismissing the above cause with prejudice and with costs.

3. The lease itself and the declaration of trust show that all parties to the transaction regarded Building Syndicate, not the trustees, as the real owner of the building.

4. Building Syndicate was the owner of the bank building during the years in question.

Dated this 13th day of April, 1960.

/s/ JOHN F. KILKENNY,
District Judge.

[Endorsed]: Filed April 13, 1960.

United States District Court,
District of Oregon

Civil No. 9887

BUILDING SYNDICATE CO., an Oregon Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The Court having considered the evidence and the arguments of counsel and having entered its findings of fact and conclusions of law herein,

It Is Ordered that the above cause be and the same is hereby dismissed with prejudice and that the defendant have and recover its costs and disbursements from plaintiff in the sum of $.....

Dated this 14th day of April, 1960.

/s/ JOHN F. KILKENNY,
District Judge.

[Endorsed]: Filed April 14, 1960.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: United States of America, defendant, and C. E. Luckey, United States Attorney for the District of Oregon, its attorney:

Notice Is Hereby Given and Building Syndicate Co., an Oregon corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from each and every part of that certain judgment in favor of defendant entered herein on April 14, 1960, and from the whole thereof.

Dated: May 13, 1960.

/s/ THOMAS B. STOEL,

HART, ROCKWOOD, DAVIES, BIGGS AND STRAYER,
Of Attorneys for Plaintiff-Appellant.

Service of copy acknowledged.

[Endorsed]: Filed May 13, 1960.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The points upon which plaintiff-appellants intends to rely on this appeal are as follows:

1. The court erred in stating Findings of Fact Nos. 2, 19, 20 and 21 as Findings of Fact, since they are actually conclusions of law.

2. The court erred in concluding that plaintiff's predecessor, Building Syndicate, was the owner of the building for income tax purposes during the years 1927 through 1943 and that it properly computed depreciation on the total purchase price of the building (Findings of Fact No. 20), since the 1927 transaction was not a mortgage loan (Opinion, page 7).

3. The court erred in concluding that the retirement of the land trust certificates was equivalent to refinancing a loan and had no effect on the basis of the property (Findings of Fact No. 19) and that plaintiff's basis for depreciation is the same as that of its predecessor (Findings of Fact No. 21), since the 1927 transaction did not create a mortgage loan (Opinion, page 7).

4. The court erred in concluding that the Lease and Declaration of Trust show that all parties regarded Building Syndicate as the owner of the building (Conclusions of Law No. 3), since those documents conclusively establish that its interest was a leasehold with an option to purchase.

5. The court erred in making Finding of Fact No. 21 that the basis for depreciation in Building Syndicate Co. was the same as it was in the former Building Syndicate.

6. The court erred in making Finding of Fact No. 18 that the undepreciated balance of the build-

ing cost, rather than the unamortized balance of the leasehold estate, was added to the amount paid in retirement of the land trust certificates.

7. The court erred in concluding that plaintiff's predecessor, Building Syndicate, was the owner of the building during the years in question (Conclusions of Law No. 4), since its only interest in the building was a leasehold with an option to purchase.

8. The court erred in concluding that this case is controlled by the decision in Helvering v. F. & R. Lazarus & Co., 308 U. S. 252, 60 S. Ct. 209 (1939) (Opinion, pages 6 and 7).

9. The court erred in concluding that plaintiff failed in its burden of proof herein (Conclusion of Law No. 2).

10. The court erred in failing to hold as a matter of law that neither plaintiff nor its predecessor made any investment in the building itself prior to exercise of the option to purchase in 1945.

11. The court erred in concluding that the conduct of plaintiff's predecessor, Building Syndicate, constituted a construction of the lease and declaration of trust against its interest (Opinion, page 5).

/s/ CLEVELAND C. CORY,
Of Attorneys for Plaintiff.

Service of copy acknowledged.

[Endorsed]: Filed August 3, 1960.

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR TRANSMITTAL OF EXHIBITS

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties that an order may be entered directing the clerk of this court to transmit all the original exhibits herein to the clerk of the United States Court of Appeals in San Francisco, California; and it is further

Stipulated and Agreed that the printing of the said original exhibits may be dispensed with and that the said original exhibits may be handed to the court at the time of the hearing of the said appeal.

/s/ CLEVELAND C. CORY,
Of Attorneys for Plaintiff.

/s/ EDWARD J. GEORGEFF,
Of Attorneys for Defendant.

It Is So Ordered this 4th day of August, 1960.

/s/ JOHN F. KILKENNY,
United States District Judge.

Presented by:

/s/ CLEVELAND C. CORY,
Of Attorneys for Plaintiff.

[Endorsed]: Filed August 4, 1960.

United States District Court
District of Oregon

Civil No. 9887

BUILDING SYNDICATE CO., an Oregon Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

November 4, 1959

Before: Hon. John F. Kilkenny, District Judge.

Appearances:

MESSRS. THOMAS B. STOEL,
GEORGE H. FRASER, and
DAVID G. HAYHURST,
Of Attorneys for Plaintiff.

MESSRS. ARTHUR L. BIGGINS and
EDWARD J. GEORGEFF,
Assistants United States Attorney,
Appearing for Defendant.

TRANSCRIPT OF PROCEEDINGS

The Court: Are the parties ready in Building Syndicate versus United States, Civil 9887?

Mr. Stoel: Ready for plaintiff.

Mr. Biggins: The Government is ready, your Honor.

The Court: I take it the pretrial order has not been signed by Counsel. I will pass that to the bailiff, and we will have that signed before we proceed. Gentlemen, do you care to make opening statements? I have read your memorandums and the Agreed Facts but not the contentions in the pretrial order. I have not had time to read the contentions. You may use your own judgment as to whether you want to make the opening statements. Mr. Stoel?

Mr. Stoel: I would like to make a brief opening statement, your Honor.

The Court: Yes; you may proceed.

Mr. Stoel: Your Honor, the basis, the question in this case is the basis of depreciation of the American Bank Building owned by the plaintiff, and this question, we believe, turns on the nature of the transaction in 1927 by which the Northwestern Bank Building was sold.

For the convenience of your Honor, we have prepared a chart that appears on the blackboard there, trying to demonstrate the nature of the interests that were created in connection with the transaction in 1927 as we conceive them to be and the flow of money that occurred in order to accomplish the purpose. With your permission, I may from time to time refer to that as a means of illustrating my opening statement.

In 1927 what is now the American Bank Building property, then known as the Northwestern National Bank property, was for sale. A local real estate

broker named George Black was interested in trying to arrange a sale of the property. In connection with working out a plan for the sale, he learned of the financing [2*] device known as Land Trust Certificates, which had achieved some popularity in Ohio at this time, and he communicated with an Ohio underwriting firm, George W. York & Company, to learn how this device might be applied in developing an arrangement for the purchase of this building.

The communications with George W. York and Company by Mr. George Black resulted in a commitment letter from George W. York Company to Mr. Black, describing how the Land Trust Certificate device plus a leasehold might be used to acquire the property.

Mr. Black then obtained an option from the owners of the property to purchase it for cash for approximately two million, two hundred thousand dollars. I might say that these figures are rounded off here so that we will not be bothered with odd dollars or cents.

Mr. Black was still in the position of a commission agent attempting to arrange a way of selling this property, and he took his proposition to the local businessmen, including Mr. Harry Kendall, for help in working out the solution which George W. Black had proposed. That resulted in a local group of businessmen working up interest locally in furnishing the funds which would be required in addition to the sale of the Land Trust Certificate proceeds to purchase the property.

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

The local businessmen determined that they could sell first mortgage leasehold bonds on this property in the amount of about [3] $750,000, and they determined that they could raise locally or stock in a company to become lessee of the proposed company $300,000, and in early August they formed a company known as Building syndicate with a capitalization of $300,000 and with subscriptions for stock in that amount.

That company took an assignment from George Black, as shown by the dotted line coming down from Building Syndicate (indicating on chart).

The months of August or early September were occupied in negotiations for working out financing that was necessary, and, in brief, the proposal was this, that the Land Trust Certificate arrangement would produce net $1,250,000 towards the purchase. That was to be obtained—may I walk over here and point it out, your Honor?

The Court: Yes.

Mr. Stoel: A trustee for the Land Trust Certificate holders, The Union Trust Company of Cleveland, was to be the principal Trustee, let us say, and Security Savings and Trust Company of Portland was to be Co-Trustee in order to hold title to the property in Oregon.

The proposal was that the Security Savings and Trust and The Union Trust would sell $1,350,000 face value of Land Trust Certificates and that, realized from that, they are to deposit into this purchase fund $1,250,000. In return for that, the Union Trust Company and the Security Savings, as Trus-

tee for [4] these Land Trust Certificate holders, would receive the fee in the property, and that fee would be held, under the theory of the Land Trust Certificates, for the benefit of the Land Trust Certificate holders, each of whom would be entitled to an undivided equitable beneficial interest in the real property in the amount of his respective holding. If one held one share or one Land Trust certificate, he would have 1/1350th equitable interest in the real property. So it was to be $1,250,000 from that source.

The arrangement further was that Building Syndicate, a local corporation, was to raise and to purchase a 99-year leasehold in the property with approximately $950,000 to go in to make this total, and its funds were to be made up of corporate funds or else the sum of $300,000 worth of stock that was subscribed for, and they had made arrangements and were in the course of making arrangements in August with Lumbermens Trust Company, a local trust company, to issue these first leasehold mortgage bonds in the amount of $750,000, which Lumbermens Trust Company would underwrite in that amount, and then sell, and that was to produce additional funds to make up the $950,000.

These arrangements, as I say, took considerable negotiations in working out the documents between early August and September, and they culminated in a final closing of this entire purchase in escrow to Title and Trust Company on September 30, 1927, and the parties to the escrow generally were Northwestern National [5] Bank, Building Syndicate, the

Lumbermens Trust Company, and they were Union Trust Company and Security Savings and Trust Company, Trustee and Co-Trustee, and the part that each of them was to play in the escrow and the documents and the money that they were to put in were as shown here generally.

In other words, Union Trust and Security Savings were to deposit $1,250,000, and Building Syndicate was to put in whatever amount was additional to the leasehold bond money that came in that was on the $950,000, and that would give us a total of two million two to go to the seller.

That amount being deposited, the seller was required to give a deed to Security Savings and Trust Company as Trustee.

In the same escrow there was deposited a leasehold mortgage indenture from Building Syndicate to Lumbermens Trust under which this company mortgaged its leasehold to Lumbermens Trust.

Also, in the deposit in escrow was a form of lease from Security Savings and Trust to Building Syndicate, a 99-year lease with option to renew and with option to purchase, requiring payment of annual rentals and so forth.

With those documents deposited and the money deposited the escrow was consummated, and the documents came out to the parties, as shown by the arrows here, and, as already explained, the money was deposited and went to the owners of the Northwestern National Bank.

The Court: What was the price mentioned in the

option from [6] Union and Security Savings to Building Syndicate?

Mr. Stoel: This option price is $1,417,500 from Union Trust to Building Syndicate. I think this is a general outline of the transaction.

As I say, when the escrow was closed, it is our view of the transaction that the interests of the parties were as illustrated here; that the property was owned by the Trustee for the Land Trust Certificate holders who held—it is our theory as we see this case that the Land Trust Certificate holders held beneficial interest in the real property itself in the sums represented by their fractional holdings of certificates. Building Syndicate has purchased here, as we see it and we believe and sincerely allege, a leasehold for 99 years plus this option to purchase for $950,000. The people who bought bonds from Lumbermens Trust Company simply held a first mortgage bond on the leasehold. That was their security, and they were to receive their interest on those bonds.

The Court: When you say purchased a leasehold, do you mean the $950,000 was in addition to an annual rental that was going to be paid?

Mr. Stoel: That is right, your Honor. Now, just to complete the picture on this and to show how we get down to the plaintiff in this case, let me say first that there is sometimes a little confusion in names here.

The Court: How does the lessee purchase the leasehold? [7]

Mr. Stoel: How does the lessee purchase a leasehold?

The Court: Yes.

Mr. Stoel: I think he purchases it by obtaining a document which is a lease, which grants him a lease for the particular period and making payment of some money either directly or over a period of years for which he purchases it by that means.

The Court: He purchased that from the Security Savings?

Mr. Stoel: That is right. That is our concept of the transaction because at the moment that Building Syndicate purchased the leasehold Security Savings had just secured the fee in the simultaneous escrow proposal. In other words——

The Court: That was not money that was moving to Security Savings and Trust, though, was it?

Mr. Stoel: No; it was money which made it possible for Security Savings and Trust to receive a deed to the fee.

The Court: But what beneficial interest did Security Savings and Trust get out of it?

Mr. Stoel: It is our view that Security, as representative of the Land Trust Certificate holders, received an ownership in the property subject to this outstanding leasehold. That is what we would say.

Now the name of this company formed in 1927 was Building Syndicate. It ran into difficulties in the 30's with the depression, and finally in 1943 the leasehold bondholders foreclosed, and in a reorganization proceeding the present [8] plaintiff, Build-

ing Syndicate Co., was formed, and the interests of Building Syndicate, the assets including its leasehold and other assets, were transferred in that reorganization proceeding to the present Building Syndicate Co.

That was, as the parties have stipulated here, a tax reorganization so that the tax basis of the predecessor Building Syndicate was acquired or passed over to the new corporation, Building Syndicate Co., the plaintiff here.

The Court: The stockholders also transferred their interests?

Mr. Stoel: Actually, the stockholders, the old stockholders were wiped out in fact in that reorganization. As things actually worked, really actually happened when you look at it, what happened is that the bondholders came out the new owners.

The Court: And the bondholders then transferred their interest to the new corporation?

Mr. Stoel: In this reorganization proceedings they received income, bond, and stock in the corporation. That was accomplished in 1944 actually.

In 1945 the plaintiff, owning the leasehold which it had acquired through this reorganization, exercised its option to purchase the Trustee and paid the option price, acquired at that moment the full ownership of the property, and, we contend, is entitled to add that price then paid to its base for [9] the property, and after reallocating that gross price between land and building, acquired a new depreciation base on the building from that date forward in 1945.

The issue in this case, if we can state the issue in rather complicated notes as simply as possible, I think, as we see it, is whether or not in 1927, when the Northwestern Bank Building was sold, the documents which were transferred created the interests which appeared, we believe, from the face of them they were intended to transfer, or whether it can be said that the intent of the parties, despite the formal wording of the documents, was simply to create a mortgage in the Land Trust Certificate holders and their Trustee with the ownership of the building and property being in Building Syndicate.

We believe that the documents correctly state just what the transaction was. We believe our evidence this morning will show that that was what the parties intended; that is, that they intended to create exactly those interests, and that we believe further that in those circumstances the cases do not permit a holding that the transaction was a mortgage rather than, as the documents indicate, a deed with a leasehold value.

The Court: What is your explanation, Mr. Stoel, of the early returns of the syndicate, tax returns?

Mr. Stoel: I think the early returns—I might say first it is our view that these early tax, these early returns really do not constitute evidence of the intent of the parties that we [10] are looking for in this transaction.

I think the cases will show that in order to find a deed absolutely on its face subject to a mortgage, that the intent of the parties that it must be subject to that mortgage must be shown, and I think they

will further show that that intent must be present in the minds of both parties.

I think they will also show that the unmanifested, let us say, secret intent on the part of one of the parties that it would be considered a mortgage does not constitute the kind of use really to attach any mutual intent to that effect. If that intent was communicated to the other party and if he acquiesced in it, then I think you have a situation where that type of evidence will be proper to show mutual intent that the deed absolutely should be a mortgage, but in the absence of some communication of that evidence to the grantee in this case, the Union Trust Company, and in the absence of some communication that the grantee acquiesced in that manifestation and said, "That's our view," or by silence acquiesced in it, I don't believe that the evidence on how we treated this on the tax returns or other evidence subsequent to this acquisition really gets to the point of what the intent of the parties was. In other words, the intent of one side cannot create a mortgage unless it was communicated to and acquiesced in by the other.

That answers the question very obliquely. Let me say that so far as the tax returns are concerned we do claim depreciation [11] so-called on this, and on the tax returns for these years we entered deduction for depreciation on our tax returns under that heading. I think that was in error. It was, I think, a fairly natural error in view of the, it is fair to state, confusion with respect to the tax obligations or applicability of the tax, let's put it that way, to this

type of transaction in 1927, but I again want to say it is our view that that really does not go to the question that I think will be before the Court here as to whether the parties intended a mortgage.

I think it will take something more than just the unilateral evidence of how we, as we believed at that time, erroneously displayed some facts on our tax returns to show that Union Trust Company, the other party to this transaction, acquiesced in that.

It might be helpful, perhaps, in keeping this thing straight—I don't want to make an extended argument, your Honor.

The Court: I realize that.

Mr. Stoel: I could, if you like, just run through the points that we think our evidence will show and be particularly pertinent to this issue of intent of the parties. It may help your Honor in assessing the evidence as it comes in.

Generally, those points will be the one I just made; namely, that the parties must both intend that the deed is a mortgage for the intent of one is not enough; that there must be mutual assent to that fact.

We will show, I think, by evidence of both an officer of [12] the plaintiff and an officer of the Union Trust Company that no mortgage was intended. We will show that there must be a deed—excuse me—must be a debt before a deed can be construed to be a mortgage, and we will show that there is no debt where, as here, the payment of the supposed debt is optional with the supposed debtor.

There is one further point here that I think will

be of interest to your Honor to keep in mind as this evidence comes in, and that is that this is not a common case where the owner of land, subject to existing debt, refinances that debt by making conveyance to a third party and taking an option back from that party to purchase the property. In other words, we do not have here a situation where A with a mortgage on his property of a million dollars, let us say, conveys it to the Union Trust Company and gets a million two or a million three for it and has option to purchase it back at a million five and then pays off the mortgage and so forth. This is a situation where the Building Syndicate, holding no previous interest in this property, procured the conveyance of the property to the Union Trust Company and got back a lease and an option. In other words, this is a three-party transaction, but the property was never in Building Syndicate. It was in the Northwestern National Bank.

The conveyance by the Northwestern National Bank to the Trustee was procured by Building Syndicate, and we received back, Building Syndicate received back, a lease and an option. It [13] is our view that the rule in that situation is that the transaction is not a mortgage, and it is a situation to be sharply distinguished from that in which the refinancing operation and the conveyance by an owner of a previously existing interest in the property, in which he conveys it in return for an option or less value.

I will be glad to answer any other questions. This is rather a complicated original transaction. If there

is anything I can clarify going forward, I will be glad to do it.

The Court: You may proceed.

Mr. Stoel: Your Honor, we have marked here a substantial number of exhibits which are identified in the pretrial order. I was going to suggest that these might be put in now, but if Mr. Biggins has something perhaps that would be something more appropriate.

The Court: Mr. Biggins?

Mr. Biggins: I have had opportunity to examine documents in the pretrial exhibits 1 through 20 and have no objection to their being offered in evidence without further contest.

Mr. Stoel: Your Honor, we have identified, as Mr. Biggins told you, Exhibits 1 through 20. We are going to offer at this time—I can list them by number if you wish to describe them, or there are four or five that we are not going to offer immediately.

The Court: As soon as you are through with your opening [14] statement, then we will have Mr. Biggins' statement, and then you can make your offers, describing each exhibit and making some brief description so that I will understand what it is.

Mr. Stoel: Thank you.

Mr. Biggins: Very briefly, your Honor, Old Company, if I may refer to Building Syndicate as Old Company and Building Syndicate Co. as New Company—over the years the value of the American National Bank Building of course increased

substantially from the depression years into the post-war years. Knowing that, New Company went through a tax reorganization and acquired tax benefit of that tax reorganization. In consequence of that, they must assume the tax burdens of predecessor Old Company, which brings us to this.

Your Honor inquired the option price figure which is $1,417,000. You may want to know how that is broken down for future reference during the trial. The option price of $1,417,000 if we can round it off, as Mr. Stoel said, they only got $1,250,000 so $100,000, your Honor, is discounted so they sold it to the public, but there is also provision in the certificate that that can be redeemed at any time on option of the lessee, and the premium on redeemed is $50.00 a share. The premiums on 1350 certificates will come to $67,500. Those two components will be the difference between what was received in the escrow arrangement and the option price.

The transactions, as I understand them, first are addressed [15] to the Court on the intent of the parties. At this time I am a bit at sea. I don't know if plaintiff is conceding that the intent on the one side was as good as it was that this should be a mortgage transaction. If they are conceding that, I will accept that as a stipulation and restrain my cross-examination to that area; otherwise, it might have been an "even if" proposition, and I certainly don't want to restrict what we are going to do, Mr. Stoel, this morning. We are not conceding that.

Moving on to the Union Trust Company to the present plaintiffs, of course, we cannot anticipate

whether—we will have to see what the direct examination and the cross-examination will show.

On the arrangement here, there is no definite promise to pay a definite sum of money. We say that the certificate consideration here, just as it was in Lazarus and in Neighbors, there is no definite promise to pay and they had the same certificate issue which the Courts say was equivalent to a mortgage, being analogical to a loan arrangement, which we say this whole transaction was.

Now that the Court has considered the pretrial memorandum and the pretrial briefs of the parties, I believe there is nothing further to add unless you have questions.

The Court: What might be your position, Mr. Biggins—and I think this might be entirely outside the issues as raised—as to the equitable ownership value of the investment between [16] Builders Syndicate and the Land Trust Certificate owners?

Mr. Biggins: Do you mean——

The Court: What I am thinking is this: Suppose that immediately after the organization for some reason there was required a liquidation. It would appear to me that there would be an equitable interest then if we would look at it from that viewpoint, an equitable interest of Building Syndicate in the fund. Now this is just some thinking that I have been doing since looking at that chart. It is not just a hot and cold proposition here as to whether it should be definitely one way or the other. There possibly might be some medium ground there. I am just throwing that out for your consideration.

Mr. Biggins: My analysis would be this, your Honor: The market could go only two ways, up, down, or stay where it is. Staying where it is won't advance our thought. If the market goes up and the building is sold while the instruments are still in escrow, it is my belief and would be my contention that the proceeds from the sale would all go to Building Syndicate and that Building Syndicate would only be obliged to at premium, I concede, the Land Trust Certificates in the outstanding debentures.

Otherwise, if the market dropped and somebody is caught in a scissors, it will be Building Syndicate, and I further would concede that if the market dropped far enough that Security Savings and the indenture holders under the Oregon law would **[17]** have the right, which the legal instruments on their form says they do; namely, the holders of legal title and the bondholders of secured leasehold bonds then would be squeezed out.

The equity capital is in Building Syndicate. They are the owners. It is just as if this person loses 80 per cent on a loan. When the market drops 20 per cent, it is this man that is squeezed out; not here (indicating on chart). The key to the legal title is here, simply a security arrangement in the over-all view, which is our contention.

The Court: You may proceed now, Gentlemen.

Mr. Stoel: Your Honor, I would like to introduce at this time the following pretrial exhibits. I will describe them very briefly as I present them.

First is a letter of George W. York & Company

to Mr. George N. Black and Strong & MacNaughton Trust Company, dated June 21, 1927. This is referred to as a commitment letter, and I will accept that for it.

The Court: The first one was number what?

Mr. Stoel: Plaintiff's Exhibit No. 1.

The Court: That is admitted.

(Document above referred to and described, previously marked Plaintiff's Exhibit 1, was received in evidence.)

Mr. Biggins: If the Court please, if the Court thinks it would save time if they make a blanket offer of the exhibits listed 1 through 20, we have no objection. [18]

The Court: Do you want to handle those in that manner?

Mr. Stoel: No, there are some exhibits I am not ready to introduce at this time, your Honor.

The Court: Then you proceed. Thank you, Mr. Biggins.

Mr. Stoel: The second exhibit is Plaintiff's Exhibit 2 which is the original Minute Book of Building Syndicate. We have designated material set forth in the first 48 pages of that Minute Book as the Exhibit No. 2.

The Court: Admitted.

(Pages in Minute Book of Building Syndicate designated as Plaintiff's Exhibit No. 2 for identification were received in evidence.)

Mr. Stoel: Plaintiff's Exhibit 3 is a copy of a

prospectus published by the Union Trust Company, relating to Land Trust Certificates.

The Court: Admitted.

(Document above referred to, previously marked Plaintiff's Exhibit 3 for identification, was received in evidence.)

Mr. Stoel: Plaintiff's Exhibit 4, Deed from Northwestern National Bank of Portland to Security Savings Trust Company.

The Court: Admitted.

Mr. Stoel: A photostatic copy, your Honor.

The Court: Admitted.

(Photostatic copy of Deed above mentioned, previously marked Plaintiff's Ex. 4, was received in evidence.) [19]

Mr. Stoel: Plaintiff's Exhibit 5 is a photostatic copy of Assignment of Lease from Northwestern National Bank to Security Savings and Trust Company.

Mr. Biggins: We have no objection to photostatic copies.

Mr. Stoel: I was also going to say that we had referred to this Northwestern National Bank fee up here, and the deed which has just been offered is a deed to the fee. In addition, the Northwestern National Bank had a lease itself on a small parcel of property near the rear of their building. That is referred to as Parcel B, and A being the fee; Parcel B being, appearing by leasehold as a part of selling, involved selling that leasehold to Security Savings and Trust Company.

The Court: Admitted.

(Photostatic copy of Assignment of Lease above referred to, previously marked Plaintiff's Ex. 5 for Identification, was received in evidence.)

Mr. Stoel: Plaintiff's Exhibit 6, Agreement and Declaration of Trust between Security Savings and Trust and Union Trust Company as Co-Trustee and The Holders of Land Trust Certificates of Equitable Ownership.

The Court: Admitted.

(Booklet above described, previously marked Plaintiff's Exhibit 6 for identification, was received in evidence.)

Mr. Stoel: Plaintiff's Exhibit 7 is an Indenture of Lease from Security Savings and Trust, Lessor, to Building Syndicate, [20] Lessee.

The Court: Admitted.

(Booklet, Indenture of Lease, Security Savings and Trust, Lessor, and Building Syndicate, Lessee, previously marked Plaintiff's Exhibit No. 7 for identification, was received in evidence.)

Mr. Stoel: Plaintiff's Exhibit 8 is the Leasehold Bond Indenture between Building Syndicate and Lumbermens Trust Company.

The Court: Admitted.

(Document above described, previously marked Plaintiff's Exhibit No. 8 for identification, was received.)

Mr. Stoel: In the marking here we have a transposition.

The Court: Change it to the numbers in the pretrial order.

Mr. Stoel: All right, the present number 10 becomes number 8.

Plaintiff's Exhibit 11 is a Deed from The First National Bank of Portland, Trustee, to Building Syndicate Co., dated October 27, 1945. That is correctly designated, your Honor.

The Court: Admitted.

(Document above described, previously marked Plaintiff's Exhibit 11 for identification, was received in evidence.)

Mr. Stoel: Plaintiff's Exhibit 12, Assignment of Lease from The First National Bank of Portland, Trustee, to Building Syndicate Co., dated October 29, 1945.

The Court: Admitted. [21]

(Document above described, previously marked Plaintiff's Exhibit 12 for identification, was received in evidence.)

Mr. Stoel: Plaintiff's Exhibit 13 is a Quitclaim Deed from Building Syndicate to Building Syndicate Co., dated February 14, 1945.

The Court: Admitted.

(Document above described, previously marked Plaintiff's Exhibit 13 for identification, was received in evidence.)

Mr. Stoel: Plaintiff's Exhibit 14 is a Quitclaim Deed from The National City Bank of Cleveland to Building Syndicate Co.

The Court: Admitted.

Mr. Stoel: Dated in 1945.

(Document above described, previously marked Plaintiff's Exhibit 14 for identification, was received in evidence.)

Mr. Stoel: Plaintiff's Exhibit 17 is a Booklet issued by George W. York & Co., entitled "The Land Trust Certificate Analyzed for Investors."

The Court: Admitted.

(Booklet above referred to, previously marked Plaintiff's Exhibit 17 for identification, was received in evidence.)

Mr. Stoel: Plaintiff's Exhibit 19 is a Memorandum of Option from The Northwestern National Bank to George N. Black.

The Court: Admitted.

(Document above described, previously marked Plaintiff's Exhibit 19 for identification, was received in evidence.) [22]

Mr. Stoel: Plaintiff's Exhibit 20 is a Memorandum of Extension of Option made as of August 6, 1927, from Northwestern National Bank to George N. Black.

The Court: Admitted.

(Document above described, previously marked Plaintiff's Exhibit 20 for identification, was received in evidence.)

Mr. Stoel: Those are the exhibits which we would like to have admitted at this time, your Honor.

We will call Mr. Harry C. Kendall. [23]

HARRY C. KENDALL

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stoel:

Q. Can you hear me all right, Mr. Kendall?

A. Yes.

Q. What is your present position with the plaintiff, Building Syndicate Co., Mr. Kendall?

A. President.

Q. Are you a member of the Board of Directors? A. Yes.

Q. How long have you held those positions?

A. Since the organization of the company.

Q. That was about when?

A. Pardon me? Well, I am practically sure since I was President of the old company and until the new company was formed and possibly for some time after that that I was elected President of the new company. I am not sure about the exact date.

Q. What was your occupation in 1927, Mr. Kendall?

A. I was President of the Lumbermens Trust Company.

Q. What were your duties generally there at that time? A. Originating bond issues.

Q. What was your relationship or interest in the

(Testimony of Harry C. Kendall.)

Building Syndicate, the predecessor of Plaintiff here?

A. I was, I believe, approached by Mr. Black, and afterward I [24] learned about this deal, the proposed sale of the Northwestern Bank Building, and Black presented the proposition to me of the possibility of financing it through——

Mr. Biggins: If the Court please, we are going to object to the narrative type of question and answer. The question should be put in proper form so that the Government can object, have the opportunity to object as hearsay.

The Court: Yes; the answer is not responsive to the question. Would you please ask a new question?

The Witness: What was my interest?

Q. (By Mr. Stoel): I asked you first of all what was the relationship, your relationship with the Building Syndicate, a predecessor of the Plaintiff? Let me ask him direct questions on that point.

Were you one of the original stock subscribers of stock of Building Syndicate? A. Yes.

Q. Did you have any part in helping obtain other stock subscriptions from other people?

A. Yes.

Q. Did you hold an office when the corporation was first organized? A. Yes.

Q. What was that office?

A. Vice President. [25]

Q. Did you hold—were you——

A. Pardon me. I have to correct that. I don't

(Testimony of Harry C. Kendall.)

think that was immediately on the organization but very shortly after.

Q. Were you also a director? A. Yes.

Q. Did you continue as director and vice president throughout the life of that corporation?

A. Yes.

Q. That was until about what year?

A. 1927 to 1944.

Q. Was the property known as the Northwest Bank property for sale in the spring of 1927?

A. Yes.

Q. Who was handling the Northwestern Bank affairs at that time, generally?

A. O. L. Price, Trustee of the Pittock Estate, the U. S. National and the First National Banks.

Q. What was the reason for those parties having general control of the affairs of the Northwestern Bank?

A. The Northwestern Bank had gotten into financial difficulties, and the other two banks had taken it over so to speak, and Price was representing it, I presume as principal stockholder in the Northwestern National.

Q. What was the reason for the sale, if you know? Was there a liquidation in process with respect to the Northwestern Bank [26] properties?

A. Yes.

Q. Who was George N. Black in 1927? Did you know him?

A. He was a real estate broker in Portland.

(Testimony of Harry C. Kendall.)

Q. Did he have an interest in attempting to sell the Northwestern Bank property?

A. Yes; he hoped to make a commission.

Q. Did you discuss the sale of the property with him? A. Yes.

Q. What did you understand the price to be?

A. Two million two hundred thousand, I think.

Q. Did you have any understanding from him as to what the sellers required? A. Yes.

Mr. Biggins: I object to the form of the question; conclusion of the witness.

The Court: It is a conclusion of the witness.

Q. (By Mr. Stoel): You say the price was $2,200,000. Was it payable all in cash?

A. Yes.

Q. What was your interest in seeking information with respect to the proposed sale of this property?

A. To obtain a bond issue for the Lumbermens Trust Company, and when I saw the possibility of acquiring the use or income use of a valuable property for a small investment, I became [27] interested in obtaining the stock interest in the lessee corporation.

Q. Did you discuss with Mr. Black how the property might be acquired? A. Yes.

Q. What was that discussion?

Mr. Biggins: Objection; hearsay, your Honor.

The Court: On what theory do you believe that is admissible, Mr. Stoel?

Mr. Stoel: I think the witness, your Honor,

(Testimony of Harry C. Kendall.)

ought to be able to tell us what the background of the acquisition of this property was and the information which he had which led him to acquire an interest in it.

The Court: He can testify as to what information he may have had, but I do not believe hearsay is proper under those circumstances. The objection will be sustained. You are entitled to put in evidence to place the Court in the same position the parties were in at the time.

Q. (By Mr. Stoel): Do you know whether Mr. Black had an option for the purchase of this property? A. Yes; he did.

Mr. Biggins: We will stipulate that he did. Exhibits 19 and 20 are true copies of that option.

Q. (By Mr. Stoel): Did you have any discussion with Mr. Black before the date of this option which I think the record will show [28] is July 7, 1927? A. Yes.

Q. Did you work out in your own mind any plan for the financing of that property?

Mr. Biggins: I object to that; speculative and a conclusion.

The Court: The objection is sustained.

Q. (By Mr. Stoel): Mr. Kendall, you have stated that you were one of the original subscribers to the stock of this Building Syndicate and also that you obtained subscriptions from other people with respect to stock of this corporation?

A. Yes.

Q. In obtaining those subscriptions, what did

(Testimony of Harry C. Kendall.)

you describe as the transaction in which this corporation proposed to engage?

Mr. Biggins: I object to that. That calls for a declaration. The Government is not bound by it. The objection is hearsay, your Honor.

The Court: It does call certainly for a conclusion of the witness. The objection is sustained.

Mr. Stoel: Your Honor, I think that in this connection the point of this testimony is to show what kind of transaction the subscribers, including Mr. Kendall, thought they were entering into here. I think that will become pertinent on the question of what they intended this transaction to be.

Mr. Biggins: I have no doubt, your Honor, that would be pertinent if competent. The objection is on the basis of competency [29] here. There is objective evidence that exists here, the minutes of the Board of Directors meeting, but we certainly are not going to be bound by hearsay and self-serving testimony of the single surviving witness apart from these minutes, what was said to persons now deceased. If he can establish—I agree if he can establish conversations with living persons whom we can bring in the courtroom for cross-examination, he can go ahead and testify.

The Court: I do not think that would be the rule, Mr. Biggins. I do not think that is it, but I do think there is merit in the thought that whatever went forward there was finally reduced to the minutes of the corporation. Is there a claim of ambiguity in the minutes of the corporation? If

(Testimony of Harry C. Kendall.)

there is, then I will permit the evidence; otherwise, I would say we are bound by the minutes.

Mr. Stoel: Your Honor, I think there will be a claim of ambiguity. There certainly will be a definite question of interpretation of those minutes between Government counsel and ourselves. I think this will be pertinent from that standpoint.

The Court: I will permit the testimony solely on that ground.

Q. I have asked you, Mr. Kendall, how did you describe the transaction to the people whom you were soliciting for subscriptions to the stock of this corporation, the proposed transaction this corporation would enter into? [30]

The Witness: I told them that it was proposed this property would be sold to the Union Trust Company and George W. York as Trustees or a Trustee representing them as Trustee for the Land Trust Certificate owners and that the Trustee would give to Building Syndicate Co., a lease in exchange for money, a promise to pay rentals, and also there would also be an option.

This deal was pretty well set up by Black and George W. York and Company before I came into it so that my interest was in acquiring a leasehold bond issue for the Lumbermens Trust Company.

Mr. Biggins: We are getting into unresponsive testimony, your Honor. I object.

The Court: That is correct. The last portion may be stricken. You may ask another question, Mr. Stoel.

(Testimony of Harry C. Kendall.)

Q. (By Mr. Stoel): You have said, Mr. Kendall, that you yourself purchased stock in this corporation? A. Yes.

Q. Why did this transaction seem attractive to you as an investor?

A. Well, Strong & MacNaughton Trust Company assured me that the rental income could be materially increased, and if it could I thought the proposed lease terms would be attractive and possibly that we would ultimately be able to exercise the option to acquire the property if the earnings panned out as well as indicated. [31]

Q. I think the record will show in Exhibit 2, the minute book, that this corporation was organized on August 5, 1927, and the stock subscriptions, I think, are assigned on the same date.

After the organization, then, Mr. Kendall, did Building Syndicate secure from Mr. Black his option in any way? A. Yes.

Q. That option, I believe it will show—that's Exhibit No. 19—was about to expire, I think, on August 7th. Was an extension of that option secured? A. Yes.

Q. You were then an officer and Director of Building Syndicate, then, at this time we are talking about from August 7th onward?

A. I think so. I am not too clear as to the exact dates right in there.

Q. What steps were taken by Building Syndicate, then, to consummate the arrangements look-

(Testimony of Harry C. Kendall.)

ing toward the ultimate sale to the Land Trustee of the Northwestern Bank property?

A. An escrow was arranged with the Title and Trust Company so that all the—to represent all the parties involved.

Q. Was that preceded by any negotiations with respect to the terms of an instrument that would be part of that escrow? A. Yes.

Q. With whom were those negotiations conducted? Who were the parties that would be involved in those negotiations?

A. The Union Trust Company of Cleveland in regard to the fee [32] and the Land Trust Certificates; the Lumbermens Trust Company as to the underwriting of the bond issue, and the Building Syndicate Co. as to the funds derived from the sale of leasehold bonds plus the funds derived from the sale of stock, and, of course, the Northwestern National Bank as to the delivery of title of the property.

Q. Was Mr. Black one of the original subscribers to the stock of Building Syndicate?

A. Of this first group, yes.

Q. Did he remain interested in the corporation for any substantial period?

A. No; a very short time. In fact, I don't know whether any stock—I don't think any stock was actually delivered to him.

Q. In the completion of the escrow, Mr. Kendall, what documents did the various parties receive?

(Testimony of Harry C. Kendall.)

A. Securities Savings & Trust Company as Co-trustee of the Land Trust Certificate owners received a deed to the property.

Building Syndicate received a 99-year lease with option to purchase.

Lumbermens Trust Company received an indenture of lease.

Q. I beg your pardon. I couldn't hear that last, Mr. Kendall.

A. Received an indenture of lease for the leasehold bonds.

The stock subscribers received stock.

Q. Did Building Syndicate ever exercise the option that [33] Mr. Black had assigned to it from Northwestern National Bank? A. No.

Q. How did it acquire the property if it didn't exercise the option? How was the property closed out here?

A. It was arranged through this escrow.

Mr. Biggins: I object, your Honor. That method will be set forth in the legal instruments.

The Court: The best evidence would be the written instruments if they are available. I understand they are.

Mr. Stoel: I withdraw the question, your Honor.

Q. As an officer and Director of Building Syndicate at this time, Mr. Kendall, what interest did you believe Building Syndicate had in the property when the transaction was consummated?

Mr. Biggins: I object to that; calls for a conclusion.

(Testimony of Harry C. Kendall.)

Mr. Stoel: Your Honor, I think the question is going to be intent of the parties. This man was the Vice-President and Director at the time. I think his understanding of the transaction and what the company got out of it—except for the issue being raised by the Government here.

The Court: It would not be his only understanding. If the question was if he knows what matter was the understanding of the Directorate of the group there, I will permit an answer to that question. However, it still must be on the basis that there is an ambiguity in some of the documents because the Court will have to construe the documents and get from that the [34] intention of the parties, and if this will go to put me in better position to understand the evidence then I will hear it, but only for that purpose.

Q. (By Mr. Stoel): Will you answer the question, Mr. Kendall?

A. Neither I nor anybody else involved had the remotest idea that we were getting anything but a lease.

Q. Did that lease contain a purchase option as well? A. Yes.

Q. Did you believe and, if you know, did the other Directors believe that Building Syndicate owed any debt to the Trustee of Land Trust Certificate holders? A. No; definitely not.

Q. What did you believe and, if you know, what did the other Directors believe?

(Testimony of Harry C. Kendall.)

A. Pardon me, except, of course, for the payment of rental.

Q. Yes. What did you believe and, if you know, what did the other Directors believe would happen if Building Syndicate defaulted in its lease obligations? A. They would cancel the lease.

Mr. Biggins: May it be understood, your Honor, I have a running objection?

The Court: I understand it, and the evidence is being received solely on the theory if there is an ambiguity it may be used by the Court for that purpose.

Mr. Biggins: My objection also extends to the competency [35] of this witness to state what the positions of the other parties were.

The Court: I realize that.

Q. (By Mr. Stoel): Can you answer my question, Mr. Kendall, or do you want it repeated?

A. I understood that if we didn't pay the rental on time that the lease was subject to cancellation on 60 days' notice.

Q. Did you believe that Building Syndicate could claim a right to redeem the property from the Trustee for the Land Trust Certificate holders in the event of cancellation of the lease?

A. No; never had any such idea, and nobody else did.

Q. Did you participate in these negotiations during August and early September in respect to a form of lease and the proposed agreement with Union Trust Company? A. Yes.

(Testimony of Harry C. Kendall.)

Q. Did you as an officer and Director in participating in those negotiations ever represent to Union Trust Company at that time that you thought that Building Syndicate would have a right to redeem the property in the event of a cancellation of the lease? A. No.

Q. Was a representative of Union Trust Company in Portland in connection with the negotiations we are describing? A. Yes.

Q. Who was he? [36] A. A. C. Coney.

Q. To your knowledge, did he or any other representative of the Union Trust Company represent in any way that the transaction resulted in a debt owing from Building Syndicate to Union Trust Company? A. No.

Q. Did he or any other representative, to your knowledge, represent that on default to Building Syndicate Co. by Building Syndicate in the lease terms that Union Trust Company could invoke only the rights of the mortgagee? A. No.

Q. Who is custodian of the corporate records of Building Syndicate, Mr. Kendall?

A. Mr. Brewster, Secretary.

Q. Who kept custody of these corporate records during the entire period of the existence of Building Syndicate and of the present claimant?

A. The Manager, one management firm.

Q. Can you tell me who those management firms were?

A. The first one was Strong & MacNaughton Trust Company, then Robert H. Strong & Associ-

(Testimony of Harry C. Kendall.)

ates, then Strong & Brewster. The firm is now known as Strong & Brewster—it is now Brewster, Scholz & Burnett.

Q. In the day-to-day operation of Building Syndicate and under present plaintiff, what was the practice? Did you as the [37] Vice-President and Director take active day-to-day management, or do you now? A. No.

Q. How is that handled?

A. By the Manager, the management firm.

Q. What is the function of the Directors, and what is their relationship generally to that operation?

A. Well, we have had two meetings this year. We pass on matters of major policy. Usually at the request of the management when they have some problem that they think should be passed on by the Directors, we have a Directors meeting.

Q. Other than a representative of the management firm who might be an officer of the company, would the other officers other than you do about the same as you have described as doing and not participate in the day-to-day activities?

A. Yes.

Q. Do you have any records of Building Syndicate, the original corporation here, in your possession?

A. No; except, say, occasional documents or duplicates or reports to stockholders, bondholders; in other words, no official corporate records.

Q. Have you searched your record that you do

(Testimony of Harry C. Kendall.)

have for an escrow agreement relating to the acquisition of Northwestern Bank property in 1927?

A. Yes; I did make a search, although I knew I didn't have it. [38]

Q. In the Minute Book, which is Exhibit 2, on Page 19, there is a reference to a proposed commitment from Union Trust Company. Have you searched your records for that proposed commitment? A. Yes.

Q. Did you find it? A. Didn't find it.

The Court: We will have a ten-minute recess.

(Recess taken.)

Mr. Biggins: May it please the Court, could we have handed to the witness, please, Exhibit 2, which is the Minute Book?

Mr. Stoel: Excuse me. There is one further matter I would like to put upon the record.

Mr. Biggins: Certainly; no objection at all. I thought you had finished.

Mr. Stoel: No; I am sorry. Will you hand this to the witness, please, Mr. Bailiff?

(Document presented to the witness.)

Q. (By Mr. Stoel): Mr. Kendall, there has been handed to you Plaintiff's Pretrial Exhibit 17, described as a booklet issued by George W. York & Co., entitled "The Land Trust Certificate Analyzed for Investors." Did you have this booklet in your possession during the negotiations for the

(Testimony of Harry C. Kendall.)

Northwestern Bank property that you have been describing? [39] A. Yes.

Q. Do you know where it came from?

A. George Black gave it to me.

Q. Did you form some of your ideas, at least as to the interests which the parties were to receive in this transaction, from that booklet?

A. Yes.

Mr. Stoel: That is all, your Honor.

The Court: You may proceed, Mr. Biggins.

Cross-Examination

By Mr. Biggins:

Q. Mr. Bailiff, would you pass the Minute Book, Exhibit 2, to the witness, please?

(Exhibit was thereupon presented to the witness.)

Q. To put one very small point at rest at the outset, Mr. Kendall, I believe you said that, as far as you knew, George Black subscribed for 1,025 shares of common stock in Building Syndicate, but he never paid for them. Was that a correct understanding of your testimony? A. No.

Q. What did you say?

A. I didn't say how many shares, and I didn't say he didn't pay for it.

Q. What was—— [40]

A. I said he subscribed to stock, and I don't think stock was ever issued to him because his stock

(Testimony of Harry C. Kendall.)

subscription was balanced off on this commission. In other words, he had fifty thousand commission coming, and he paid ten thousand for the option, and that was credited, so that I believe it left nineteen thousand perhaps which I think he arranged to sell to other parties, so I don't think any was ever issued for Black.

Q. It is true, is it not, Mr. Kendall, that he did pay $10,000 for the option? A. Yes.

Q. And it is further true that it was agreed by the Board of Directors, of which you were a member, that that $10,000 on assignment of option to Building Certificate would be credited to his stock subscription account? A. Yes.

Q. As was done on the books of the corporation?

A. I believe so.

Q. Subsequent to that, Mr. Kendall, looking at Page 19 one minute, which is Exhibit 2 before you, you see at the bottom of the page, sir, the language:

> "It appearing to the Board that it will be necessary that the subscriptions to capital stock of this company be paid in cash"——

——incidentally, Mr. Reporter, if we go too fast we have these exhibits you could have later—— [41]

> ——"in full on or before September 1, 1927."

What does it say then, Mr. Kendall?

A. ——"in order to provide funds with which to effect the purchase of the Northwestern Bank Building property."

(Testimony of Harry C. Kendall.)

Q. All right——

——"on motion duly made and seconded it was unanimously

"Resolved that this Board of Directors make a call upon the subscribers to its capital stock for payment in full to this corporation of the amounts of their respective subscriptions in cash on or before noon of August 29, 1927."

Now, is there any entry after this, then, that you know of, Mr. Kendall, showing that Mr. Black did not pay his subscription as requested to do so?

A. Well, he didn't pay it.

Q. Thank you, sir.

Going to other matters now—by the way, who was the Secretary of that meeting, on Page 20?

A. That is Alfred A. Hampson.

Q. Do you recognize the signature?

A. Yes.

Q. What was his relation to the corporation other than Secretary?

A. He was the attorney. [42]

Q. He was an attorney. You have had a chance to refresh your recollection from these minutes, have you not, Mr. Kendall? A. I have.

Q. You are familiar with the minutes, are you not? You are familiar?

A. I have looked them over. I can't say that I am very familiar with them.

Q. Knowing you had to come to testify today, you refreshed your recollection from other corpo-

(Testimony of Harry C. Kendall.)

rate records and documents you had available to you? A. Yes.

Q. Can you point out to us, sir, one single document or one single page in the minutes of this corporation where it is stated that this property was being sold to the Security Savings & Trust Company? A. I don't believe, I don't——

Q. One such reference or one such document, Mr. Kendall; do you know of one?

A. Well, if there were two or three, I probably couldn't say that I remember them.

Q. You don't know of any at this time, do you?

A. I don't know whether I know of them or not. I can't even recall the name suddenly of a good friend of mine when I wanted to introduce him. If I may have a half a dozen documents, I couldn't sit here and tell them to you. [43]

Q. Reading the minutes of the corporation to refresh your memory, you did see many references to Building Syndicate purchasing this property; you did see those references, didn't you?

A. That's the way the wording would indicate.

Q. In these minutes; in these minutes.

A. But this wording is, I suppose, set forth in this way and, incidentally, I may never have read these minutes at the time. You know how the minutes of most corporations are handled. Somebody moves that the reading of the minutes be waived; somebody seconds it, and they are waived, and so you don't even read the minutes. It is generally just a perfunctory operation, so I didn't know what

(Testimony of Harry C. Kendall.)

the minutes said then probably, and I don't know now, except that I have looked over this book.

Now, this matter of referring to the exercise of the option or whatever it was by the building, the building never did—I mean the Building Syndicate Co. never—or Building Syndicate never did exercise the option. The option was exercised by the escrow agent with the co-operation of all the parties involved, and when we talk about buying a building we mean a group, the Trustee for the Land Trust Certificates actually was the one that bought the building or bought the property, and we got a lease. We were all parties to this involved transaction so that the wording in this book I don't think has any significance. [44]

Mr. Biggins: If the Court please, I request that the answer of the witness be stricken as unresponsive to the question.

The Court: Well, it certainly is not binding on the Court, Mr. Biggins. Therefore I will permit it to stand.

Q. (By Mr. Biggins): Do I understand it to be the practice with this Board of Directors in this corporation, Mr. Kendall, that the Minutes of the Board were considered of no importance and were not read at the subsequent meetings?

A. I would not say they were of no importance, but frequently the reading of the minutes is waived.

Q. Were they waived in this case?

A. I don't know.

Q. Addressing your attention, sir, to Pages 31,

(Testimony of Harry C. Kendall.)

32, 33, 34 and 35 of the minutes, sir, and these are in the Government's brief if the Court cares to see them, as an appendix—you see Page 31, sir? I am not asking you to read it, but glancing at it rapidly do you see Page 31? A. Yes.

Q. And 32 and 33, and in this meeting of the Board, as I understand, the various legal instruments were discussed?

A. All I know about this is what I read in this book. I naturally have no recollection of exactly what took place or when the meeting was held. All I can go by is what is shown in this book. [45]

Q. You have no recollection, then, of this meeting?

A. Well, after I look this over I might cudgel my brain to remember a little about it. Do you want me to take time to do that? I can't just look at the page from here and say I remember it.

Q. Would you look at Pages 32 and 33 rather closely for me, Mr. Kendall, please?

(Witness examines document.)

A. As far as my recollection is concerned, all I could say is——

Q. Before answering, Mr. Kendall, have you had time to examine Pages 32 and 33?

A. No; I haven't read them carefully. I hate to take all this time.

Q. That is all right.

(Witness again examines pages referred to.)

A. All I could say is I would not be able to ap-

(Testimony of Harry C. Kendall.)

prove these minutes as they read if I had had any idea of the necessity for precise and long-winded explanation of this complicated deal. We might say "we" when we are talking about the corporation or the whole group involved in this deal.

Q. Have you had an opportunity to read Pages 32 and 33, Mr. Kendall? A. Yes.

Q. All right, 34, would you glance at the first two paragraphs [46] of Page 34, sir, please?

A. Yes.

Q. Glancing over to Page 31, just indicating to you, a special meeting was called on September 19th, it says:

"The following Directors were present, Watzek, Taylor, Kendall and Luders, constituting a quorum of the Board."

You do recall being at that Board of Directors meeting now, don't you?

A. No. I assume I was there because it says I was, but I don't remember.

Q. Do you recall being at any Board of Directors meetings in which the Board as a body considered and approved a form of declaration that was to be used? A. Yes.

Q. They discussed it; they reviewed it; they approved it?

The Court: What trust agreement are you talking about?

Q. (By Mr. Biggins): Turning to Page 32, if it will help for a point of reference, Mr. Kendall, they first resolve:

(Testimony of Harry C. Kendall.)

"Resolved, that said printed form of Declaration of Trust,"

which is referred to as Exhibit A there which I assume, sir, is the same as the——

A. Yes; we looked over this, approved it.

Q. Discussed it? [47] A. Yes.

Q. And approved it? A. Yes.

Q. Do you recall any Board of Directors meeting in which the form of lease identified in these minutes as Exhibit 5 was reviewed?

A. Yes.

Q. Discussed; discussed, sir? A. Yes.

Q. And approved? A. Yes.

Q. Furthermore, a meeting in which the Board discussed the form of mortgage, over there on Page 33, identified as Exhibit C eventually, Mr. Kendall. Do you have the language there,

"Resolved, that said"——

A. ——"form of mortgage," to the Lumbermens Trust Company.

Q. Yes, sir. A. Yes.

Q. And form of bond to be issued?

A. Yes.

Q. And the Board of Directors, as you recall, reviewed them? A. Yes.

Q. Discussed them? A. Yes.

Q. And approved them? [48] A. Yes.

Q. At any point here, if the Board of Directors of Building Syndicate had not approved the trust

(Testimony of Harry C. Kendall.)

agreement, this deal would have fallen through; now, wouldn't it?

A. You mean on the Land Trust Certificates?

Q. If the Board of Directors of Building Syndicate had disapproved the form of trust agreement presented at this meeting, this deal would have fallen through?

A. I presume it would unless it could be resolved between the parties.

Q. And by "resolved between the parties," you mean, sir, Building Syndicate and the Trustee?

A. Trustee for the Land Trust Certificate owners.

Q. Yes, sir. Is that who you mean by the parties, Mr. Kendall? A. Well——

Q. Well, who do you mean by the parties?

A. Well, actually, the negotiations were between Building Syndicate and the Union Trust Company and Lumbermens Trust Company. They were the parties that had to agree on this joint deal.

Q. And the Board of Directors so regarded this, as a joint deal?

A. Joint in that each party had a certain function to perform.

Q. The Board of Directors did regard this as a joint deal?

A. Well, it depends on what you mean by joint deal. I used [49] that term rather loosely. Now we are getting so precise I will have to be a little precise. Just what do you mean by joint deal?

(Testimony of Harry C. Kendall.)

Q. What did you mean when you responded to my question, sir, on the parties to this joint deal?

A. Well, what I meant was this, was that there were three parties here that have to agree on what each one is going to do; one of them is getting the ownership to this property, give another one a lease, and they are going to issue bonds, the third party.

Q. It was a package deal, then? Can we use the word it was a package deal?

A. It was a simultaneous deal.

Q. The escrow was simultaneous, but the negotiations were in a package, were they not?

A. Well——

Q. Do you want to consider it?

A. I don't know what you mean by "package." We had to agree, each one of us, on what part he was going to take in this deal, but it was not—what I am alluding to is this: A joint agreement, when I was in the bond business we had joint agreements, and we would all be in the agreement together as equal partners. Now there is no joint agreement in that sense of the word at all. We simply had a deal here in which three parties had to agree on each one doing certain things. [50]

Q. (Approaching blackboard): Building Syndicate had an option with Northwestern, didn't it, to buy that property for $2,200,000; is that right?

A. Yes.

Q. Security Savings didn't have an option, did it? A. No.

Q. Union didn't have an option, did it?

(Testimony of Harry C. Kendall.)

A. No.

Q. And none of the Land Trust Certificate holders? A. No.

Q. Building Syndicate didn't have enough money to buy that property, did they?

A. No.

Q. They only had $300,000? A. Yes.

Q. So you got together a group as a syndicate to raise more money?

A. Not as a syndicate, no.

Q. Well, to raise more money?

A. No, not as a syndicate. It was——

Q. Union said it could sell some trust certificates, approximately $1,350,000. Now that was negotiated first between Black and Union Trust, wasn't it? A. Yes.

Q. And a commitment made? [51]

A. Commitment with somebody else.

Q. George York, excuse me.

A. From York and Black, yes.

Q. Subsequent to which Union took over the commitment? A. Yes.

Q. And renegotiated the commitment with Building Syndicate? A. Not necessarily.

Q. Look at Page 45 of the Minutes, Mr. Kendall, and refresh your recollection, 45 and 19, 45 and 18, sir. What page do you have open before you?

A. 45.

Q. Let's turn back—well, I do not have 19 there. May I approach the witness, your Honor?

The Court: Yes.

(Testimony of Harry C. Kendall.)

Q. (By Mr. Biggins): Reading 45, do you recognize the signature? A. Yes.

Q. Well, these are in evidence on Page 45, aren't they, Tom?

Mr. Stoel: Yes.

Q. Well, reading, and you follow me mentally: "A communication was received from the attorneys of The Union Trust Company of Cleveland for a signed copy of the original commitment between The Union Trust Co. and the Building Syndicate. It was the decision of the Directors that as this commitment had never been signed that the deal had been [52] consummated without it, and that in the final closing of the transaction several modifications had been made rendering the commitment of no value and that it would not be possible to comply with their request."

Now, turning to Page 18, sir, and holding your finger at Page 45 if you want to refer back to it—19—do you see the language:

"There was also submitted a form of proposed commitment covering the purchase of the Land Trust Certificates by Union Trust Company and George W. York. Attention was called to the fact that this commitment contains a provision relative to the payment of interest on the interim certificates which was not contained in the original commitment. On motion duly made and seconded it was unanimously"——

And then the resolution changing it?

Does that refresh your recollection now, Mr. Ken-

(Testimony of Harry C. Kendall.)

dall, that a subsequent commitment was negotiated between Building Syndicate and Union after the original commitment with George Black and George York & Co.?

A. Well, all I can say is that I assume that it was from these minutes, and I cannot say that I remember. I do remember something about this interest that was asked for, and we objected [53] to it.

Q. Have we established, Mr. Kendall, to your satisfaction and recollection that a subsequent commitment was negotiated between Building Syndicate and Union?

A. No; I am afraid not. This Land Trust Certificates deal was set up before I had anything to do with this deal, between York and Black, and I can't recall any modification that was made on that.

I do have a hazy recollection about some argument about the interest that would be charged during some interim period, and we objected to it.

Q. Could I have Exhibit 3 handed to the witness, please?

In your hand, Mr. Kendall, is Exhibit 3 which is the prospectus or proposal of Union Trust Company to sell these certificates to the public. You are familiar with the certificate, sir?

A. Yes.

Q. That certificate was worked out with Building Syndicate, though, wasn't it—that prospectus, I mean, and Building Syndicate did work out and approve Exhibit 3, did it not? A. Yes.

(Testimony of Harry C. Kendall.)

Q. In fact, the minutes on Page 19, if you will look at it, Mr. Kendall, authorize and apparently directed you, sir, Mr. Kendall, to endorse the approval of this corporation thereon and forward the same to the Union Trust Company. Do you see that on Page 19? [54] A. Yes.

Q. Which you did? A. Yes.

Q. So this was worked out with Union Trust Company for Building Syndicate? A. Yes.

Q. Security Savings didn't have anything to do with that, did they, this prospectus here?

A. No; I don't think so.

Q. Northwestern Bank didn't have anything to do with that either, did they? A. No.

Q. Northwestern Bank didn't have anything to do with the commitment deal, either one or both? They were not part of the negotiations and had nothing to do with it, did they?

A. I would say they did. They understood how they were going to receive this money through this escrow arrangement.

Q. From Building Syndicate?

A. No; not from Building Syndicate. The money never went to Building Syndicate. We never had the money.

Q. Northwestern Bank took no participation in negotiations or changes in the original financial commitment with Union Trust for George York; now, that's true, isn't it? A. Yes.

Q. All right. Security Savings took no part in

(Testimony of Harry C. Kendall.)

the negotiations [55] or endorsement of the prospectus; we have established that, haven't we?

A. Yes.

Q. Nor did they take any part in the negotiations of the financial commitment, either the one between George Black and York Company or Union Trust and Building Syndicate, and they took no part in those negotiations, did they?

A. I would say they did.

Q. When, where, and who was there, Mr. Kendall, as you recall?

A. We were dealing all through this transaction with the Union Trust Company, with the Northwestern Bank, the Lumbermens Trust Company. The Security Savings & Trust Company, of course, were more or less passive in the whole matter. They were simply the Co-trustee acting for the Union Trust Company.

Q. It reduced down to this, didn't it, Mr. Kendall: Building Syndicate dealt with Union—right?

A. Yes.

Q. Building Syndicate dealt with Security Savings & Trust, negotiated with them? A. No.

Q. They didn't negotiate with them?

A. No; they negotiated with Union Trust, and Union Trust told Security Savings what to do, I would say.

Q. Are you saying Building Syndicate had no negotiations with Security? [56]

A. No, not what I would call negotiations.

Q. Building Syndicate had negotiations with

(Testimony of Harry C. Kendall.)

Lumbermens Trust, didn't they? A. Yes.

Q. Northwestern Bank? A. Yes.

Q. And their mortgage company, the company that had the mortgage on the building they owned?

A. It was understood when this money was paid that Northwestern Mutual would get their money out of it. We never had any negotiations with them directly.

Q. Well, let's look at the record.

A. That was arranged between Northwestern Bank and the Northwestern Mutual Life.

Q. Let's look on Page 27, Mr. Kendall, of the minutes, reading quickly the resolution that they have there on Page 27:

"Be It Resolved, that the President and attorney"—who is the attorney, again?

A. I presume it was Al Hampson.

Q. He was the one that was Secretary, as I recall, of these minutes we looked at; is that right?

A. I presume so.

Q. "Be It Resolved that the President and attorney of the company be and they hereby are authorized and directed to attend a meeting to be held at noon [57] of this day at the offices of Lumbermens Trust Company, at which meeting are to appear representatives of said Lumbermens Trust Company, First National Bank, United States National Bank and Northwestern National Bank, there to take such action as the President may deem necessary or advisable relative to extension from Northwestern National Bank of the

(Testimony of Harry C. Kendall.)

present option held by this company for the purchase of the Northwestern Bank Building property and/or relative to any other agreements required to be made with any of the organizations to be represented at said meeting for the purpose of making possible the completion of the proposed purchase of said Northwestern Bank Building property."

Building Syndicate did have some negotiations with the people holding the mortgage on Northwestern, so far as you recall; now didn't they?

A. I don't recall that we did, but I can't see that it makes any difference; but I just don't recall.

Q. But Union Trust was not at that meeting we just looked at, were they? A. No.

Q. Or Security Savings weren't at that meeting, were they?

A. I presume not. They are not mentioned here.

Q. So, bringing it to a close, Mr. Kendall, the Board of Directors of Building Syndicate approved the financial commitment [58] with Union Trust; did they not? A. Yes.

Q. All right. And they approved a trust agreement that was subsequently drafted?

A. Yes.

Q. And they approved the mortgage?

A. Yes.

Q. And the bond issue? A. Yes.

Q. With Lumbermens Trust? A. Yes.

Q. And those were all approved on or around

(Testimony of Harry C. Kendall.)

the meeting of September 19, 1927, before these instruments were put in escrow?

A. Yes; I presume that they were. I would say that they were.

Q. And all of these instruments were delivered to Building Syndicate; all these executed instruments were delivered to the Building Syndicate?

A. I don't know whether they were or not.

Q. But you do know that Building Syndicate carried the ball from there to see that the escrow arrangement was carried out?

A. Well, Building Syndicate plus Black plus Strong & MacNaughton Trust Company were the pushers on the deal. The three were all involved and all co-operating to carry it through.

Q. As representatives of Building Syndicate?

A. As representatives of Building [59] Syndicate.

The Court: Who were representatives, Mr. Biggins?

Mr. Biggins: The people he just mentioned, sir. That will be on Pages 39 and 40.

Q. Would you take a quick look at Pages 39 and 40, Mr. Kendall? A. Yes.

Q. You see there on Page 39 that Strong & MacNaughton should appoint an agent. Now turning over to Page 40:

"After a general discussion of the situation existing relative to the proposed purchase of the Northwestern Bank Building property and statement that the escrow will probably be completed

(Testimony of Harry C. Kendall.)

by the delivery of the papers not later than the 30th instant, the Board directed the attorney to deliver to Strong & MacNaughton Trust Company, as the managers of the property, all original papers in his possession covering the purchase of the property."

So Strong & MacNaughton were getting in this deal as the agents of Building Syndicate; weren't they? A. Yes.

Q. In closing that escrow?

A. Yes—well, no—I don't think in closing the escrow.

Q. Who closed the escrow, then, Mr. Kendall?

A. Well, I would say that all the parties involved closed it by unanimous approval and consent.

Q. Isn't this what happened now, Mr. Kendall? Exhibit A, [60] which is referred to as the draft agreement, was negotiated and approved by the Board of Directors, and the original submitted to the Board; that's true, isn't it? A. Yes.

Q. Exhibit B, which was the last I believe so negotiated and approved by the Board of Directors and the original executed and deposited with the Board of Directors? A. Yes.

Q. Exhibit C, a mortgage, was reviewed, discussed and approved, and the original executed and deposited with your Board of Directors?

A. Yes.

Q. Then an escrow agreement was worked out

(Testimony of Harry C. Kendall.)

and executed by the Board of Directors, Step 4, Exhibit D?

A. And the other parties involved.

Q. Yes; an escrow agreement was worked out, and then the Board of Directors instructed its President to execute the escrow, Step 5, didn't they, as you recall?

A. Well, I can't say that I recall it. All I can do is read the book here and assume.

Q. You will accept that, what is in the book, as correct; do you not?

A. No, I do not, because a lot of it is absolutely incorrect.

Q. Because it shows these Trust Certificates as corporate liability; is that one? [61]

A. That's one.

Q. Because it suggests that Building Syndicate was buying this property; is that another?

A. That's correct; that is another that is incorrect. Both of those are incorrect.

Q. Could you suggest at this time, sir, then, why the income tax returns, if it should later develop were returned on the basis that Building Syndicate owned this property that the Trust Certificates were liabilities, would you have an explanation at this time? A. No, I——

Q. All right; if it should later——

A. But that was prepared by an accountant, and I probably never even saw that.

Q. If it should develop by subsequent evidence, Mr. Kendall, that the annual reports of your cer-

(Testimony of Harry C. Kendall.)

tified public accountants, which included three different ones—there were three different ones; you recall that, sir—— A. Yes.

Q. ——should all show this land as being owned by Building Syndicate and these Trust Certificates as liabilities, would you have an explanation for that, sir, at this time? A. Yes.

Q. Which would be——

A. The fact that the bookkeeper or accountant or whoever it [62] was originally set it up probably wanted to show all the money involved in this escrow deal, and, being familiar with that Land Trust Certificate or this kind of a deal, it probably showed the amount of money received from the sale of Land Trust Certificates as though it were an indebtedness, which, of course, it was not. The facts absolutely show, and it is just perfectly apparent, that these documents and these returns are totally contrary to the facts.

Q. Who is Mr. A. R. Watzek, Mr. Kendall?

A. He is a local gentleman.

Q. What was his connection with Building Syndicate? A. He was President of it.

Q. And E. J. Chase?

A. He was a bookkeeper, I believe, with Strong & MacNaughton Trust Company.

Q. Was he not Assistant Secretary of Building Syndicate?

A. The records show that he was. I had forgotten that he ever was. I have never even met the gentleman.

(Testimony of Harry C. Kendall.)

Q. Peat, Marwick, Mitchell & Co. has been the auditor for a number of years? A. Yes.

Q. And I. D. Wood & Co.? A. Yes.

Q. And that is since Mr. Tourtellotte, a certified public accountant by the name of Arch [63] Tourtellotte? A. Yes.

Q. Do I understand your testimony to be, Mr. Kendall, that all of these men and all of these documents, including the minutes of your own Board of Directors meetings, are mistaken in your view?

A. Yes.

Q. Is there anybody else living or any other documentary evidence available which you have now, sir, which would support your view?

A. Yes.

Q. Yes?

A. Well, A. R. Watzek, for instance, President of the company, he never had any idea that we owned this property or that we had had a liability —or mortgage or anything of the sort. I never even dreamed of anything like this until this tax case came up. Nobody ever assumed it was a mortgage. Nobody ever assumed we owned the property. At the time of the negotiations with Union Trust Company we assumed they could cancel our lease on 60 days' notice, and on one occasion we got down on our knees and begged them to give us time. We didn't think we had any year's time of redemption. We had none of the prerogatives of a mortgagor.

Q. Moving back to 1927, the corporation was named and the pursuits which are here. What the

(Testimony of Harry C. Kendall.)

parties were trying to do, as you know, Mr. Kendall, was simply to get enough money to pay [64] for the building for which it had an option?

A. No.

Q. And the Land Certificates?

A. We never intended to buy the building. We never had any possibility of buying the building. We couldn't raise enough money to buy the building. The only thing we hoped to have was a leasehold.

Mr. Biggins: That is all, Mr. Kendall.

Redirect Examination

By Mr. Stoel:

Q. Mr. Kendall, there has been a good deal of reference here to minutes and the characterization of this transaction in the minutes. I do not have a copy of the minutes directly in front of me, but I think I can broadly characterize the areas that Mr. Biggins has been discussing here. I think you have just read here frequent references in these minutes to the purchase of this property by Building Syndicate, and I think other places refer to acquisition of the property by Building Syndicate.

You have testified, I think, in your final answer here that you understood that all you were getting was a leasehold. Now, what was the term of that leasehold, Mr. Kendall?

A. A 99-year lease with the privilege of extensions and an option to buy for $1,417,500. [65]

Q. Did you understand that under that lease

(Testimony of Harry C. Kendall.)

that you have the right to occupy the building during the entire time of the lease, talking in general terms, for 99 years? A. Yes.

Q. As long as you didn't default?

A. Yes.

Q. Did you understand that if you could raise the money to exercise the option, that you might some time acquire the entire property?

A. Yes.

Q. During the period that you might be occupying the property as a lessee, would you have complete control of the premises as far as the rental policies, retaining the net profits of the company for yourself, the lessee, excluding people from the building, most of the rights that go with—are thought to go with ownership? A. Yes.

Q. And to put in a layman's view of the transaction, then, any referring to the minutes of showing no references in the minutes to the acquisition or purchase of the Northwestern Bank Building property——

Mr. Biggins: I am going to object to further leading questions, your Honor.

The Court: The question is leading. Sustained.

Q. (By Mr. Stoel): You have been asked again —let me go [66] back and ask you in the term Mr. Biggins asked it, perhaps. These minutes refer to purchase of property and the acquisition of the property, and will you state your answer again as to what you thought you were acquiring?

A. A leasehold.

(Testimony of Harry C. Kendall.)

Q. Is that the word used, I think, normally through these minutes to Northwestern Bank Building property? You have got the incidents of ownership that you understood were a part of that leasehold interest that you have such as possession, control, and so forth; is that right? A. Yes.

Q. So that in referring to the purchase of the property and in saying that you understood the purchase was a leasehold, is it fair to say that what you had in mind was the acquisition of these interests incident to a leasehold?

A. Yes; in referring to this as ownership of the property, you might compare it to a man who is in possession of a house that belongs to his father, and his father is in a rest home and going to die, and he is going to inherit the house. He would be very likely to refer to that house as his house. He lives in it; he knows he is going to own it or hopes he is going to own it. We were living in his house, and we hoped that some day we would own it, but for twelve years it looked as if we couldn't even retain possession of it without getting a concession from the Trustee for the Land Trust Certificate owners [67] whom we knew could cancel our lease on 60 days' notice and throw us out, and we acted accordingly, and everybody acted accordingly, and nobody ever suggested that we had any rights of redemption or could defend ourselves in any way.

In fact, when one of our officers got a little tough on the deal, the Trustee immediately proceeded to

(Testimony of Harry C. Kendall.)

take steps to cancel the lease, and I remember very will that incident where I persuaded that gentleman to give us a little more time, and we were doing our darndest to work it out for twelve years when we were practically, well, over ten years when we were unable to pay our lease requirement even.

Q. In the negotiations which have been reviewed with you by Mr. Biggins leading up to the final escrow agreement, Building Syndicate was a corporation staffed by local people, was it not?

A. Yes.

Q. They were interested, you have said, in acquiring a leasehold in this property with an option to purchase? A. Yes.

Q. I think that you have also said that that was all that you could see your way free to or be able to finance at that time, was the acquisition of that leasehold and option to purchase?

A. It was utterly impossible to finance a first and second mortgage. In the first place, Lumbermens Trust Company would not underwrite the second mortgage issue, and, in the second [68] place, the first mortgage would require about 5 per cent interest plus about 5 per cent payments on principal, which would be 10 per cent on what was $1,350,000, $135,000. There wouldn't be anything left for anybody. That would have taken all the income there was there.

Q. Because you saw this as a—you and your group, Building Syndicate, saw a feasible way to acquire an interest in the property for the kind of

(Testimony of Harry C. Kendall.)

investment that you could make, is it fair to say that you were interested in pushing the deal to a conclusion?

A. Certainly, and we were all interested in getting possession of what we hoped could be made into a valuable income-producing property with a very small investment. The only possible way to do that was through a leasehold.

Q. So that because of this interest in pushing the matter to a conclusion, you would have taken an active role——

The Court: Mr. Stoel, your questions are very, very leading.

Q. (By Mr. Stoel): Did you take an active role, then, in Building Syndicate in the pressing of this matter to a conclusion after the August formation of Building Syndicate?

A. Yes, I definitely did, even to getting out of my role as a buyer and becoming a salesman traveling all across the country to sell the leasehold bonds.

Q. Was it necessary that the other two parties to this [69] transaction, two principal parties, namely Union Trust Company and Lumbermens Trust Company, that their agreement be obtained to the proposal for closing this transaction?

A. Yes.

Q. Why was that necessary?

A. Because they were putting up the money, all except the $300,000 of stock.

Q. Did, then, all three of the parties—Building Syndicate, Union Trust and Lumbermens Trust—

(Testimony of Harry C. Kendall.)

participate, each representing its own part of the transaction in the formation of the escrow agreement? A. Yes.

Mr. Biggins: That calls for a conclusion, your Honor.

The Witness: I have stated it already.

The Court: It does call for a conclusion. The instruments are the best evidence.

The Witness: I think I have stated that several times in the testimony.

Mr. Stoel: I think that is all, your Honor.

Recross-Examination

By Mr. Biggins:

Q. Just one question on surrebuttal, Mr. Kendall. I think you said Lumbermens Trust would not give you a second mortgage on this property. Did you testify to that? [70]

A. That we were not undertaking to market a second mortgage.

Q. So the inquiry was made? So such an inquiry was made of Lumbermens Trust? A. No.

Q. Well, how do you know they would not market it for you, Mr. Kendall?

A. Because I was buyer for them, and my business was setting up bond issues. I knew we would not go out and try to sell second mortgage bonds. It was bad enough to sell the first mortgage leasehold bonds, and we had considerable difficulty in doing that.

(Testimony of Harry C. Kendall.)

Q. So that was the reason we finally had to resort to this financing arrangement, wasn't it?

A. There was never any question—I knew the moment this was put up to me by Black that the setup he had was the only practical way that I could play any part in this deal. I didn't have to analyze it.

Q. And the very words, I submit, Mr. Kendall, the very words you used with Mr. Black were that, "We could purchase this property"? Now, honestly, those were the words used, weren't they?

A. Well——

Q. Those words back there when you were talking to George Black, "It is the only way we can buy this property"; that's what you said, now, wasn't it? [71] A. We never did buy it.

Q. But that's what you said?

A. All right, now, there is just an example of loose use of words. Maybe I did say that, but you know what I meant, acquire possession of this property to get the benefits from the rent.

Q. Thank you, Mr. Kendall.

A. I am just not a lawyer, and I am not a writer, so perhaps I don't use exactly the right word at the right time.

Mr. Stoel: That is all I have.

The Court: You may step down, Mr. Kendall. We will have our noon recess until 1:30, 1:30 this afternoon.

(Noon recess taken.) [72]

Afternoon Session

(Proceedings herein were resumed at 1:30 p.m. of the same day, pursuant to the noon recess, as follows:)

The Court: You may proceed, Mr. Stoel.

Mr. Hayhurst: We will call Mr. Coney.

AMIS C. CONEY

a witness produced in behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hayhurst:

Q. Will you state your address, please, Mr. Coney? A. Pittsburgh, Pennsylvania.

Q. What is your present occupation, Mr. Coney?

A. I am a general partner of a New York Stock Exchange firm in Pittsburgh by the name of A. E. Masten & Company.

Q. What is the address of that company, please?

A. First National Bank Building, Pittsburgh.

Q. Mr. Coney, have you had considerable background in the investment business?

A. Yes, all my life.

Q. Would you please describe your background?

A. I finished college in 1909, and I went into the investment [73] banking business with William A. Read & Company of New York, now Dillon, Read & Company, and for about twelve years I had an office in Rochester, New York, and handled the busi-

(Testimony of Amis C. Coney.)

ness out of all Western New York from Syracuse to Buffalo.

Then I went from there to the Union Trust Company of Cleveland, and I had charge of investigating and underwriting the purchasing of securities of different kinds.

Q. In what year did you go with the Union Trust Company, please? A. 1921.

Q. Were you with the Union Trust Company in 1927? A. Yes.

Q. In what capacity?

A. Well, the capacity that I just spoke of, and my title was Vice-President.

Q. Were you with the Bond Department of Union Trust Company at that time? A. Yes.

Q. Could you please tell us what the function of a Bond Department was in Union Trust Company at that time?

A. Well, the function of a Bond Department of that bank, and I think most other banks that had Bond Departments, was to take care of investment business in all its phases that was done with the customers of the bank; in other words, as distinct from managing the bank's own portfolio. That included the underwriting [74] and purchase, distribution of all kinds of investments except common stocks. We were not permitted to deal in common stocks by the Ohio laws and by the Federal Reserve regulations.

Q. Mr. Coney, in 1927 did you have occasion to become familiar with a transaction involving the

(Testimony of Amis C. Coney.)

Northwestern National Bank property in Portland, Oregon? A. Yes.

Q. Did you participate in that transaction?

A. Yes, I did.

Q. In whose behalf did you participate?

A. The Union Trust Company.

Q. Mr. Coney, what was the policy of the Union Trust Company at that time in relation to Land Trust Certificate transactions?

A. Well, we were empowered to, and did also, deal in that form of investment. The policy was to buy the plan, take title to it in trust capacity, and issue certificates of equitable ownership and sell them.

Q. Was Union Trust Company at that time actively seeking out properties to buy for this purpose? A. Yes, if we felt they were good.

Q. Mr. Coney, apart from this transaction in Portland, Oregon, involving the Northwestern Bank Building, to your knowledge had this form of transaction ever been used in Oregon before?

A. I never heard of it on a public transaction, and I think I would have heard if it had been. [75]

Q. Mr. Coney, how was this particular transaction involving the Northwestern Bank property brought to your attention?

A. An investment firm in Cleveland, George W. York & Co., called it to our attention.

Q. To the best of your recollection, Mr. Coney, what was the stage of the transaction at the time it was called to your attention?

(Testimony of Amis C. Coney.)

A. An agent named George Black had called it to the attention of George York & Company, and George York & Co. had made a preliminary investigation, brought it to us, said that Mr. Black had an option on the property here, the building of a defunct bank, the Northwestern Bank, and asked us if we would like to investigate it further with the idea of ultimate issuance of Land Trust Certificates for their distribution.

Q. Mr. Bailiff, would you please hand the witness Plaintiff's Exhibit 1?

(Document presented to the witness.)

Q. Mr. Coney, will you please examine Plaintiff's Exhibit 1 and then state to the best of your recollection whether or not that document was in existence or had been received or issued by George W. York & Co. at the time that you were called into the transaction? A. Yes; yes, indeed.

Q. Did you then make an investigation of the Northwestern National Bank property? [76]

A. Yes, I investigated it personally and also got our officer in the bank building interested, which, incidentally, then was said to be the largest bank building or commercial building in the world—a very able man, to come out here and go over it, verify the values and the operations, and on his favorable report I came out here.

Q. Mr. Coney, after the Union Trust Company came into the picture what happened to George W.

(Testimony of Amis C. Coney.)

York & Company? What part did they then play in the transaction?

A. Well, it became joint underwriters, minor underwriters, but after we had purchased the issue of Land Trust Certificates we syndicated them, which means we interested other dealers in buying and distributing them, and York was one of those dealers. I don't remember on what scale.

Q. Mr. Coney, what was the situation of the Northwestern National Bank of Portland at this time? A. We were told it was in liquidation.

Q. To your knowledge, Mr. Coney, was the Northwestern National Bank of Portland affiliated in any way with the Union Trust Company of Cleveland?

A. No.

Q. In this transaction, Mr. Coney, what role was played by the Union Trust Company of Cleveland?

A. Well, first we investigated the property and, as I told you before, tried to make sure that it gave a sound basis for [77] the purchase of the real estate and distribution of certificates; and, second, we negotiated for the purchase of the property on terms substantially like those that are set forth in this letter from Mr. Black to George York & Company.

Q. Did Union Trust Company in connection with this transaction sell certificates of beneficial ownership in the property to investors, to the public?

A. Yes.

Q. Would the Bailiff please hand Plaintiff's Exhibit 3 to the witness?

(Testimony of Amis C. Coney.)

(Exhibit presented to the witness.)

Q. Mr. Coney, do you recognize the document marked as Plaintiff's Exhibit 3? A. Yes.

Q. Was that document prepared by yourself?

A. It was prepared by my department, and I had a good deal to do with it; yes, sir.

Q. Was Plaintiff's Exhibit 3, or, of course, counterparts of that exhibit, used by the Union Trust Company in marketing Land Trust Certificates to the public? A. Yes.

Q. Of course, those were certificates of beneficial interest in the Northwestern National Bank property that we have been talking about?

A. Yes. [78]

Q. Mr. Coney, what was the transaction between Building Syndicate and Union Trust Company?

A. Building Syndicate was a corporation, a new corporation, which entered into a 99-year lease with the Union Trust and the Security Savings & Trust as owners of the fee.

Q. I think we have not mentioned that before. What was the role played in this transaction by Security Savings & Trust Company of Portland, Oregon?

A. It was a Co-Trustee since a Cleveland banking institution was not permitted to hold real estate outside of the State of Ohio.

Q. Has that been the reason why the Security Savings & Trust Company was associated by the Union Trust Company in this transaction?

(Testimony of Amis C. Coney.)

A. Yes.

Q. Would you continue, then, please, to describe the relation or the transaction between Building Syndicate and Union Trust Company?

A. I beg your pardon?

Q. I say, would you please continue with your description of the transaction between Building Syndicate and Union Trust Company?

A. Well, as we proposed to be the owners of the fee, we had the job of negotiating a long-time lease with all of its provisions with the corporation that was to be the lessee corporation, [79] and that was our principal negotiation.

Q. In this particular transaction who was to be the lessee corporation?

A. Building Syndicate.

Q. Mr. Coney, what was the transaction, if you know, between Building Syndicate, having established a leasehold estate, planned to mortgage that estate and issue leasehold bonds against it which were to be sold to the Lumbermens Trust Company? Did you personally, Mr. Coney, participate in any negotiations with Building Syndicate concerning the terms of lease from Union Trust Company to it?

A. Oh, yes.

Q. Do you recall who the persons were with whom you dealt in those negotiations?

A. Well, I think principally with Mr. Robert Strong of Strong & MacNaughton Trust Company and occasionally with Mr. Kendall who is here, and

(Testimony of Amis C. Coney.)

with Mr. Hampson of Dey, Hampson & Nelson, their attorneys.

Q. Do you recall any of the subjects of those negotiations?

A. Well, in a long-time lease there are many provisions that had to be agreed upon by both lessor and lessee, such as, for example, default provisions, covenants, agreements to maintain property and to pay the taxes, and so forth.

Q. With regard to the negotiations on the default provisions, Mr. Coney, was it ever suggested or discussed in those [80] negotiations that the lessor would be compelled to bring an action in court in order to terminate the interest of Building Syndicate?

A. No, this was an outright ownership and a lease of 60 days' notice to the Trustee representing the Land Trust holders, terminating the lease.

Q. Was there in those negotiations ever any discussion or mention that Building Syndicate would have a period of time following default and termination of the lease in which it could redeem its interest in the property?

A. No, none whatsoever.

Q. Mr. Coney, what interest in this property did Union Trust Company acquire in this transaction?

A. The whole fee.

Q. Was this fee acquired by Union Trust Company only as a security interest for the debt of Building Syndicate?

A. No, there was no debt.

(Testimony of Amis C. Coney.)

Q. Mr. Coney, in this transaction, to the best of your knowledge, did Building Syndicate ever apply to Union Trust Company for a loan on this property? A. No.

Q. Did anyone else ever apply for such a loan in behalf of Building Syndicate?

A. No, not to my knowledge.

Q. Was a loan ever offered to Building Syndicate by Union [81] Trust Company on this property? A. No.

Q. In the various negotiations in which you participated, was there ever any discussion of a loan on this property of Union Trust Company?

A. No.

Q. Mr. Coney, at any time around the time of this transaction, or prior thereto, was Building Syndicate to be indebted to Union Trust Company?

A. No.

Q. As a part of the negotiations in which you participated, Mr. Coney, was there ever any agreement or discussion that Building Syndicate was required to exercise its option to purchase the property? A. No, it was a pure option.

Q. I want you to understand that I am speaking now of an option given by Union Trust Company to Building Syndicate. A. Right.

Q. During these negotiations and the periods surrounding the closing of the transaction, was there ever any mention or discussion that the fee in the property was being taken by Union Trust Company only as security? A. No.

(Testimony of Amis C. Coney.)

Q. Mr. Coney, as a result of your experience in the investment business, are you familiar with mortgage financing? [82]

A. Yes, I have done mortgage financing.

Q. Is it part of your experience that ordinarily a mortgagor has the right to redeem the property after a default by paying off the indebtedness and making up the default? A. Yes.

Q. Was there ever any suggestion in any of these negotiations that Building Syndicate would have such a right with respect to the interest which it held under the lease from Union Trust Company?

A. No, indeed.

Q. Mr. Coney, in 1927 would you have recommended to the Union Trust Company that they make a loan of $1,250,000 on this particular property in this transaction? A. No, I would not.

Q. In your opinion, Mr. Coney, would any other responsible lender have made such a loan on this property?

Mr. Biggins: I object to that question.

The Court: Sustained.

Q. (By Mr. Hayhurst): Mr. Coney, can you state whether or not the Land Trust Certificate was regarded as a popular investment by investors in Ohio in 1927? A. Yes, it was very popular.

Q. Can you describe the reasons for that popularity?

A. Yes, I think I can. In the first place, most of them were really good investments. They were, they involved the ownership [83] of good property

(Testimony of Amis C. Coney.)

with adequate improvements. The record was excellent and has been even through the depression. Also, we had at that time an extremely high personal property tax in Ohio which was very onerous and made the ownership of fixed income securities rather hazardous, and these being, of course, not securities but interests in land, were not subject to personal property tax since the real estate taxes were paid by the lessee under the terms of the lease.

Mr. Hayhurst: That concludes our direct examination, your Honor.

The Court: Mr. Biggins?

Cross-Examination

By Mr. Biggins:

Q. May it please the Court. Mr. Coney, I believe you said you had one of the best experts in the business go out to appraise this property?

A. No, I didn't say that at all.

Q. Somebody came out to appraise; is that right?

A. Somebody came out to examine it and see if it was suitable property for us to buy for this purpose, yes.

Q. I believe you testified, Mr. Coney, that you were familiar with the commitment that George Black had with the George York Company. You looked at Exhibit 1? A. At the letter, yes. [84]

Q. All right. Now, after the commitment, Exhiibt 1, was made, Union Trust Company made a second and different commitment with Building Syndicate, did they not? A. Yes.

(Testimony of Amis C. Coney.)

Q. Now, in that second commitment—by the way, do you know whatever happened to any copies of it? Do you have a copy of it? A. No.

Q. Do you know what happened to it?

A. No.

Q. When you made that commitment, it was on the written understanding that the property had to meet a certain appraised value; was it not?

A. I don't recall any such thing, no.

Q. It was common in the Union Trust Company in inviting and underwriting, if you will, the land fee certificates to require a minimum appraisal on the property, was it not?

A. I don't believe that was a pre-condition requirement, no.

Q. If this property were appraised by an independent appraisal expert, Mr. Coney, as $1,350,000, would your company issue a fee land certificate on the total amount?

A. Well, it depends on who appraised it.

Q. Exactly, sir; and an appraisal would have to be made, wouldn't it?

A. No; in answering your question, we would not make any [85] commitment on an appraisal we didn't see.

Q. May I see Exhibit 1, please? Looking at Page 3 of Exhibit 1, Mr. Coney, it says in the second paragraph down,

"You will supply us with——"

Will you notice that language, please——

"You will supply us with——"

(Testimony of Amis C. Coney.)

Would you read it, sir?

A. Yes, I have read that.

Q. "You will supply us with all necessary description of the property, pictures of building and appraisals——"

Now, would you read that into the record, appraisals of what?

A. "——and appraisals of both land and building by responsible appraisers of the City of Portland, acceptable to us."

Q. And continuing?

A. "Such appraisals shall show a valuation of the land of not less than $1,370,000 and a valuation of the building of not less than $1,350,000."

Q. Was it customary to make such a requirement in making a commitment under a fee certificate issue as this appraisal?

A. Well, it was sometimes done and sometimes not.

Q. But Union Trust did in this case, sir?

A. In this instance Union Trust, they say——

Q. Could I have Exhibit 3, please? [86]

(Document produced.)

Q. That is a prospectus. Would you examine it? That is the Union Trust prospectus now, isn't it, Mr. Coney? A. Yes.

Q. Which was sent by Union Trust to Building Syndicate for their approval? A. Yes.

Q. Later issued and published by your company to the investing public? A. Yes.

(Testimony of Amis C. Coney.)

Q. Included in which, under the style, "Valuations," about the middle of the page, it says,

> "The land owned in fee has been appraised by Mr. Philip V. W. Fry of Portland, Oregon,"

at how much? A. $1,400,000.

Q. And for the building?

A. And the building, $1,384,000.

Q. And the total as indicated in your prospectus is $2,784,000; right? A. Yes.

Q. Why was that valuation appraisal put in your prospectus, Mr. Coney?

A. Well, because the purchaser of a Land Trust Certificate is entitled to know what appraisers and others think of the value [87] of the property that is being transferred to him in equitable ownership form.

Q. Knowing that and knowing that and making recommendations on this issue, your company sought and secured information as to this appraisal, didn't they? A. Yes.

Q. If this appraisal had been less than two million dollars, would your company have underwritten this issue?

Mr. Hayhurst: I object to that as speculative, your Honor.

The Court: It is properly cross-examination.

The Witness: I haven't any idea.

Q. (By Mr. Biggins): They would have to take a second look at it, wouldn't they?

A. I haven't any idea what would have been done.

(Testimony of Amis C. Coney.)

Q. You were the supervisor of what department for Union Trust?

A. I was in charge of the underwriting and purchasing and, to some extent, distribution of securities, although we had a sales manager for it.

Q. Which was called the Bond Department, I think? A. Yes.

Q. In Ohio your bank made mortgage loans on satisfactory security; did they not?

A. Yes.

Q. But in Ohio your bank did not successfully float mortgage bond issues, did they? [88]

A. Yes, they did.

Q. Are you familiar with Mr. B. G. Huntington, President of Huntington National Bank of Columbus?

A. I knew him in his lifetime—which Huntington?

Q. B. G. Huntington, President of the Huntington National Bank of Columbus, Ohio.

A. Well, I have met the gentleman years and years ago, yes.

Q. Would you have agreed with his statement on the condition of the market in Ohio that many of these——

Mr. Hayhurst: Will you clarify this as to the time, please?

Mr. Biggins: Well, it is some time that we are at in the Lazarus case. I believe that loan was dated around 1926, 1927, 1928, right around in that area, where he stated that in many of these financing

(Testimony of Amis C. Coney.)

arrangements that they negotiated in the form of Land Trust Certificates because this is all almost the only possible plan because of local—meaning Ohio—taxation on mortgage bonds. Would you agree with that statement? A. No.

Q. But many members of the financial community in Ohio at that time did hold such an opinion; did they not?

A. I don't know. There were many, many taxable bond issues floated in Ohio at that time.

Q. Which were, if I use the word "sticky," and, as a financial man, you know what I mean, don't you? Sticky, a sticky market? [89]

A. I know what you mean, but you are wrong in your conclusion.

Q. The market on mortgage bond issues was sticky in Ohio at this time?

A. I don't know.

Q. The market in the certificate fee issues, you will accept that as a common language in handling your loans?

A. Land Trust Certificates is the term we use.

Q. Land Trust Certificate, the Land Trust Certificate market was easier in Ohio at this time, but would you finance real estate undertakings because of the absence of the local personal property tax on that?

A. It was not invariable. It was not even general. It depended entirely on the facts of the case.

Q. And the facts of the case depended on the value of the underlying building, the value and security of the underlying building?

(Testimony of Amis C. Coney.)

A. And a hundred other considerations.

Q. Value and the security, sir, of the underlying building?

Mr. Hayhurst: I think he has answered that question, Counsel.

Mr. Biggins: No, he has not.

The Witness: Many other considerations.

Q. (By Mr. Biggins): You hesitate to say Yes, sir?

The Court: Can you answer that Yes or No?

The Witness: I don't think I can, your [90] Honor.

The Court: If you cannot, that is final.

Q. (By Mr. Biggins): At no time did Union Trust Company have an option to purchase this property from Northwestern, did they? At no time did they have that option? A. Well——

Q. Strike the question.

You knew there was an option some place to buy this property for $2,200,000; you knew that, didn't you?

A. Well, I knew it was in the letter that you just showed me from George Black to York.

Q. And you knew that this option was going to be sold for more than was being raised by the Land Certificate issues; you knew that?

A. Well, at what point? After it was all over I knew it, of course.

Q. Let's look at Exhibit 3 again, Mr. Coney. Is that still before you? A. Which is that?

Q. Exhibit 3, sir; the prospectus, sir.

(Testimony of Amis C. Coney.)

A. Yes.

Q. Look down there where it says investment or security, I am not sure which. Is there not a reference to the fact that there is an investment of $750,000 in leasehold mortgage bonds after the Land Certificates? Isn't that reference there in that prospectus? **[91]**

A. It says, "The investment in the leasehold estate is evidenced by an issue of $750,000 First Mortgage Leasehold Bonds, and a large cash investment in common stock of the Lessee corporation."

Q. Which, from an investor's point of view, indicated the safety factor in this investment, did it not?

A. Well, it indicated a safety factor, yes.

Q. And the Land Trust Certificates were regarded, to use financial language, as priming the leasehold mortgage bonds?

A. I don't know what you mean by priming. I never heard that word before.

Q. May I ask you this way, then, sir: Have the leasehold bonds underwritten by Lumbermens Trust Company had a security lien prior to that of the Land Certificates underwritten by your company? A. Prior to that?

Q. Yes, sir. You knew that they owed——

A. I just don't understand your question at all, leasehold bonds having security.

Q. Let's look at the money that went into this, Mr. Coney. $750,000 came out of the bonds; you knew that?

(Testimony of Amis C. Coney.)

A. Yes—I didn't, nothing like $750,000 came out.

Q. What did you say in your prospectus?

A. It said it is evidenced by the issue of $750,000 that was paid for the issue. [92]

Q. But you didn't tell that to the people you sold those to?

A. Well, this was evident.

Q. Yes, $650,000, is that the closing——

A. Six hundred seventy I think is the figure. I am not sure.

Q. The Land Trust Certificates, the actual sales price was $250,000?

A. That isn't the sales price. That is the purchase price.

Q. Didn't you sell—yes, that's right, $350,000?

A. No, that isn't it either, 1,350 equal, undivided shares was sold at $1,010 for each of those shares. That was the sales price.

Q. To yield 5.44, but the face of the Land Certificates themselves——

A. There was no face. You cannot have a face of a thing other than evidence of ownership.

Q. A printed piece of paper went out, didn't it, Land Trust Certificate? A. Yes.

Q. On the face of those certificates was the amount, a thousand and how much—a thousand dollars, wasn't it?

A. No, 1,350 equal, undivided shares, but there is no figure of $1,350,000 in any of the literature.

Q. To my question, though, Mr. Coney, you knew

(Testimony of Amis C. Coney.)

they were going to have to pay this money to the bondholders——

Mr. Hayhurst: What is this now, Counsel? [93]

Q. Indicating on a blackboard $670,000, that was furnished through Lumbermens Trust Company financing, and you knew those had to be paid, didn't you? A. Had to be paid?

Q. Yes.

A. Well, what compulsion was there for anybody to pay it? At what point were we supposed to know that?

Q. Let's take it as a hypothetical question, and being an expert in the financial field, Mr. Coney—let's assume that there was a bond issue for $670,000 by Building Syndicate. Let's assume that. Would it be material to your consideration in issuing this Land Certificate issue whether or not there was an obligation on the part of Building Syndicate to pay these bonds before they paid you, the holder of the Land Certificates?

A. Not necessarily, because they could all have been in stock, or it could have been in any other form.

Q. If it was in the form of bonds, sir, and payment on those bonds came before the payment of the rent, would that have been significant in considering the underwriting of this issue?

A. I don't understand the conditions you are citing in which payment on the leasehold bonds would be prior to the payment of rent.

Q. Let's skip to the blackboard then. In financ-

(Testimony of Amis C. Coney.)

ing a corporation there are varieties of equitable capital furnished; are there not? [94]

A. Sometimes.

Q. Pardon? A. Sometimes.

Q. There is common stock?

A. Well, if it's a stock——

Q. That is easy, isn't it, Mr. Coney? There is common stock?

A. There usually is common stock.

Q. Preferred stock there can be?

A. Well, I know one of your largest companies right here in Portland that doesn't have any common stock. I mean, if you are trying to pin me down, the Great Northern Railroad has no common stock.

Q. Are you familiar with financial arrangements that are commonly made with corporations?

A. I have some knowledge of it.

Q. Generally speaking, there is common stock?

A. Generally speaking, if you put that in, I would say Yes.

Q. And preferred stock?

A. Maybe sometimes.

Q. Sometimes, and secured bonds; secured bonds?

A. Sometimes.

Q. Indentures?

A. Sometimes—indentures, there isn't any such thing as a security called an indenture. An indenture is a deed of trust.

Q. Debenture. I used the wrong word— [95] debenture.

(Testimony of Amis C. Coney.)

A. Yes; there can be debentures, yes.

Q. In arranging, in general terms, Mr. Coney, on the financing of a corporation, is it important to the senior bondholders whether or not the debenture payment comes before or after the security of the prime bonds, as a general proposition in arranging corporate finances?

A. I never heard of a case in which an unsecured debenture is paid until the first mortgage is paid.

Q. Exactly, the first mortgage bonds look for the security of the property itself? A. No.

Q. What do they look for their security on?

A. Well, the property itself only in foreclosure.

Q. The payment being expected out of the income that is earned from the property?

A. Well, that is very different, yes.

Q. And being paid prior to the payments made to junior debenture holders?

A. Well, as a rule, but not always even there.

Q. It is something considered in floating the prime bond issue, isn't it?

A. Well, what is the something considered in this?

Q. A security of investment, and answer it this way, if we may, then: Would there be a difference in interest rate paid between a secured bond and an unsecured debenture? [96]

A. Might be——

Q. On the same corporation at the same time?

A. No; it might be very different. One type of debenture might get a much lower rate, and I fre-

(Testimony of Amis C. Coney.)

quently have seen it. It might have a much earlier maturity, for example. It might be convertible. There are lots of conditions in which a debenture would get a lower rate than a mortgage bond.

Q. Just one final question, Mr. Coney. You say your appraisal there came out to $2,784,000 on this prospectus?

A. Well, the appraisals of these two gentlemen who are quoted here, yes.

Q. I am asking you whether under Ohio law and under the policy of your bank of which you are Supervisor in the Bond Department——

Mr. Hayhurst: I object to this question, your Honor, as far as it relates to Ohio law. This man is no expert on that.

Q. (By Mr. Biggins): Under the scope of your authority as Supervisor of the Bond Department of the Union Trust, I am asking you, sir, could you have underwritten the full Land Certificate issue to the full amount of the appraisal price? Your answer is No, isn't it?

A. No; I don't know whether it is or not.

Q. Would you have recommended it, Mr. Coney?

A. Oh, I can't reconstruct all the factors at this time to decide whether we would or not. I haven't any idea.

Q. Are you suggesting, sir, Mr. Coney, that as Supervisor [97] of one of the largest financial institutions in Cleveland that you are not at all certain whether or not you personally would recommend to your investing clients the full issue of

(Testimony of Amis C. Coney.)

Land Trust Certificates in the full amount of the appraisal price? You are not certain?

A. I am not suggesting anything.

Q. You would not have recommended that, and you know as a matter of policy of your bank they would not have permitted it either, would they?

A. I haven't any idea.

Mr. Biggins: That is all.

Mr. Hayhurst: If your Honor please, Mr. Fraser has pointed out one matter to me that perhaps should more properly have gone in on direct. I would like to clear it up right now.

The Court: You mean to open up your case?

Mr. Biggins: We have no objection.

Further Direct Examination

By Mr. Hayhurst:

Q. Mr. Coney, is the Union Trust Company still in existence? A. No.

Q. When did it go out of existence?

A. Well, it was closed by the RFC, the Federal Reserve Board, in 1933, and there was a liquidator and a conservator who kept the bank open—I mean kept the property as such, Union Trust [98] Company, for several years after that.

Q. Do you know who was the successor to Union Trust Company under the lease of Northwestern Bank property, to Building Syndicate?

A. Yes, the National City Bank of Cleveland.

Mr. Hayhurst: That is all.

(Testimony of Amis C. Coney.)

The Court: Mr. Coney, I would like to ask a question. Are these Land Trust Certificates still in use?

A. In Ohio? Well, I am sorry, in use, a great many of them are still outstanding, sir.

The Court: No; I mean new issues.

The Witness: The tax law was repealed in Ohio, and I have not seen any new issues of these for a good many years. I doubt if it is still in use.

The Court: In your institution you use this form of a certificate for the sale of lands or acted as trustees on more than one occasion?

The Witness: On many occasions.

The Court: On many occasions. Was the option clause in favor of the lessee always in the——

The Witness: Not always; no, sir. The earlier ones didn't have it, some of the earlier ones.

The Court: That is all. [99]

Cross-Examination

By Mr. Biggins:

Q. That raises a couple of questions. Didn't you think the option clause, Mr. Coney, always had a provision where the lessee could redeem those certificates, though; did they not? A. No.

Q. Any matter that your firm floated, one issue, sir, that they didn't have the option or right to redeem?

A. Now you used the word "always." I don't know anything about always.

Q. Can you think of a single instance where

(Testimony of Amis C. Coney.)

they didn't have one of two things, either the option to purchase the property or the right to redeem the certificates, that you know of?

A. Not that I know of where they had the right of redemption of the certificates. You cannot redeem.

Q. There is the right of redemption of certificates in this one trust agreement, is there not, on payment of a $50 premium? A. No.

Q. You are not aware of that being in this agreement?

A. No; it is just simply the right to purchase property, in which case the trustee pays the certificate owners.

Q. In understanding the tax question in Ohio, Mr. Coney, there was a tax on mortgage bonds for awhile; is that correct? A. Yes.

Q. When that was repealed, the tax on mortgage bonds, you [100] know of no new issue of Land Trust Certificates, and that was your answer to the Court, wasn't it?

A. Well, I—yes; I don't know of any such now.

Q. And the companies went back to mortgage bonds, though of a similar arrangement?

A. No; I have not heard of any big mortgage bonds. The market for real estate securities in general with the public has almost completely disappeared since the Depression. There were numerous concerns in the business of setting up, issuing real estate bonds of all categories, but for at least ten

(Testimony of Amis C. Coney.)

years I do not recall a single such issue coming to the public.

I think public real estate financing has gone by the board. It has been done privately.

Mr. Biggins: Thank you, Mr. Coney.

(Witness excused.) [101]

WILLIAM L. BREWSTER

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Stoel:

Q. What is your present occupation, Mr. Brewster?

A. I am a member of the firm of Brewster, Scholz & Burnett engaged in the property management business.

Q. Do you hold any office in plaintiff, Building Syndicate Co.?

A. I am the Secretary-Treasurer.

Q. How long has your firm been the—strike that—is your firm the building management firm which operates for the Building Syndicate Co. the American Bank Building? A. It is.

Q. Do you know what building management firms have occupied the same capacity for the plaintiff or its predecessor company since 1927?

A. Yes.

Q. Can you name those? First, start in 1927?

(Testimony of William L. Brewster.)

A. First, Strong & MacNaughton Trust Company; then its successor, the Commonwealth Trust & Title Company, I think the name was; then the management was transferred to Robert H. Strong who did business under the style of Robert H. Strong & Associates. After that it was handled by a successor partnership known as [102] Strong & Brewster, of which I was a member with Robert Strong, and then finally by Strong & Brewster, which was the business under which I did business as an individual, and finally under the partnership which is the present management; Brewster, Scholz & Burnett.

Q. Have you been employed by or a partner in all of the firms that you have mentioned?

A. Yes.

Q. During this period? A. Yes.

Q. Have you, as the Secretary-Treasurer, custody of the corporate records of Building Syndicate Co.? A. I do.

Q. And of the existing records of its predecessor company, Building Syndicate?

A. Yes; certain records as we have from the previous company.

Q. Have you searched those records, both those of the plaintiff and the predecessor company, for an escrow agreement which has been referred to as the closing agreement in the Northwestern Bank Building purchase? A. I have.

Q. Were you able to find it?

(Testimony of William L. Brewster.)

A. I was not. I have no record of ever having it in the company files.

Q. Did you also search the records for the document which is [103] referred to in the minutes as the trust commitment from Union Trust Company in 1927?

A. I likewise searched for that, and likewise I have no record of ever having received it from the previous managers.

Mr. Stoel: That is all.

Mr. Biggins: May it please the Court, as a preliminary inquiry, I will want to ask some questions on the books and records which I know would be improper cross at this time.

Mr. Stoel: Mr. Brewster can remain here, I think, if that is your question.

Mr. Biggins: Or do you want me to do it at this time for his convenience? I will do it either way.

Mr. Stoel: I think he is going to remain.

The Witness: I will be available.

Mr. Biggins: I have no questions at this time, then.

The Court: You may step down. Please remain here, Mr. Brewster.

(Witness temporarily excused.)

Mr. Stoel: Plaintiff rests, your Honor.

Mr. Biggins: May it please the Court, may I call Mr. Brewster as a hostile witness under the Rules?

The Court: You may. [104]

WILLIAM L. BREWSTER

was thereupon produced as an adverse witness in behalf of the Defendant and, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Biggins:

Q. I believe you said, Mr. Brewster, you are the custodian, corporate custodian of the books and records of Building Syndicate Co. and the prior company, the Building Syndicate? A. Yes.

Q. You recently made a search of these various books and records for certain documents?

A. I did.

Q. During the making of the search, did you even inquire or find out how Building Syndicate—that is, the old company—how Building Syndicate handled the purchase of this property on their books? A. No; I did not.

Q. Do you know to your own knowledge?

A. No, because I was——

Q. All right; I cannot ask you if you don't know.

Is your capacity both Secretary and Treasurer, sir?

A. Secretary-Treasurer for Building Syndicate Co.

Q. And, as Treasurer, are you familiar with elementary fundamentals of accounting?

A. I believe so. [105]

Q. Being familiar with elementary funda-

(Testimony of William L. Brewster.)

mentals of accounting, if a person purchased property, the usual accounting entry we would expect to find would be a debit to building and a credit to mortgage payable; is that right?

A. I didn't know any mortgage was involved here, sir.

Q. If we buy a building like the American National Bank Building on credit, part cash but mostly credit, what would be the entries you would expect to find on the books of the corporation?

A. Well, I think you would have us show a debit to the assets account and a credit to the source of the funds, whatever they might be.

Mr. Biggins: If it please the Court, could I ask the witness to examine—is this 5-foot-thick bundle that I have in my hand here, do you recognize this as being the general ledger of Building Syndicate?

A. Yes.

The Court: Is that marked as an exhibit?

Mr. Biggins: No; I have not marked any, and perhaps at this time, if the Court please, I have a whole group of documents to offer.

The Court: Are they marked?

Mr. Biggins: They are marked. We offer into evidence in this case the original income tax returns of Building Syndicate from 1927 through 1946. We didn't mark them in the pretrial exhibits, your Honor, because they were going to make objection, [106] as you recall.

The Court: I thought you were going to list

(Testimony of William L. Brewster.)

them, however. You did mention that yesterday afternoon.

Mr. Biggins: We will hand it over.

The Court: All right; we will want a list of these and then add it to the pretrial order. It will be amended so as to show it.

Mr. Biggins: I might offer Exhibit 50 for Identification, your Honor, the original income tax returns of Building Syndicate from 1927 to 1946.

The Court: What is that?

Mr. Biggins: I am making the offer so he can make the objection.

The Court: What are we offering, Mr. Biggins? We want to get this marked. What are you offering at the present time?

Mr. Biggins: I have the original income tax returns for all these years, 1927 through 1946.

The Court: Are you offering it as one exhibit or as individual——

Mr. Biggins: Yes, your Honor, they have already been marked, and they are catalogued there as A through R.

The Court: That is what I do not have, A through R.

The Clerk: No. 50, Exhibit No. 50, A to R, including R.

The Court: As I understand it, there is no objection to the authenticity of these? [107]

Mr. Stoel: Your Honor, there is no objection, if I may——

The Court: As to the authenticity.

(Testimony of William L. Brewster.)

Mr. Stoel: No, authenticity, no.

The Court: Now, then, you may have an objection at this time.

Mr. Stoel: Your Honor, I would like to inquire for what purpose defendant's counsel is offering these?

Mr. Biggins: As objective evidence of the intent and understanding of the parties, as evidence by their written jural act.

Mr. Stoel: I object to this, your Honor, on the ground that this is not any evidence of the intent of the second party to this transaction, the Union Trust Company, and that there is no showing that, if it is evidence of intent of Building Syndicate, that that intent was ever communicated to Union Trust Company.

The Court: Objection overruled. Exhibits 50-A through -R are admitted.

(Documents, income tax returns above referred to, previously marked Defendant's Exhibits 50-A through 50-R, inclusive, were thereupon received in evidence.)

Mr. Stoel: I should like to add to that the objection that the returns after 1928 are too remote to bear on the event, in any event. [108]

The Court: You may include that in your objection, and the objection is overruled.

Then you are offering No. S, now, I understand?

Mr. Biggins: Government now offers, your

(Testimony of William L. Brewster.)

Honor, what has been marked as Exhibit 51 for Identification, A through——

The Court: Just a moment. We have an S in evidence yet, 50-S. It was not included in the first offer.

Mr. Biggins: That was with the first group. I believe I said through 1946. I amend that to include 50-S.

The Court: 50-S will be considered as offered. Do you want the same objection?

Mr. Stoel: Yes, your Honor.

The Court: It will be received; same ruling; received.

(Document, income tax return above referred to, previously marked Defendant's Exhibit 50-S for Identification, was thereupon received in evidence.)

Mr. Biggins: The second group of documents, may it please the Court, are copies of Federal income tax returns from the files of Building Syndicate after 1927 through 1946, the same years, marked for identification 51-A through 51-Y, and offered.

Mr. Stoel: May I ask again what is the purpose of offering these returns, Mr. Biggins? Is there some definite purpose for offering these than that you gave as your first reason for offering the original returns? [109]

Mr. Biggins: There will be several, your Honor. The income tax for 1927, which is an exhibit marked

(Testimony of William L. Brewster.)

as 51-A for Identification, contains the original final closing agreement executed between the Secretary-Treasurer and the taxpayer, which we think bars them from changing the basis of depreciation. It contains the original, and with the other year's subsequent testimony, I believe, and the accounting records of the three C.P.A.'s that has been testified to so far, I will be able to show they knew of the existence of these prior returns, they had them available for examination and probably did examine them, and that consistently during this period from 1927 onward they treated Building Syndicate as the owner of this property and the Land Trust Certificates as corporate loans.

Mr. Stoel: Your Honor, so far as the admissibility of the returns of 1927, for the reason that he first gave, clearly the disclosure in that return of an agreement, the admissibility I would make no objection to, but admissibility of these returns for any other purpose I object to on the same grounds as the admissibility of the original returns and, in addition, I object on the ground that they are simply cumulative; that he has already put in what should be the best evidence of what the parties who filed the return thought was the proper return and that there is no purpose served by adding these. We are not questioning the authenticity of the original returns. I see [110] no reason why our retained copies offer any additional evidence in the case.

The Court: The objection is overruled. Received.

(Testimony of William L. Brewster.)

(Documents, income tax returns of Building Syndicate for 1927 through 1946, previously marked Defendant's Exhibits 51-A through 51-Y for Identification, were thereupon received in evidence.)

Mr. Biggins: I am not offering what has been marked for identification as Exhibit 3 at this time. I do not believe I need it, but, if the Court please, I am going to have a problem here. I do not want to offer this whole book. I do not think it is necessary. I would like to take numbered pages with the understanding any pages they might want in will be all right with me, too.

The Court: I agree that it is too voluminous to offer that entire exhibit, and if any part of it is admissible then I believe it should be the individual pages.

Mr. Stoel: With the understanding that there may be other portions that could be segregated out of there from our standpoint, we will work on that basis.

The Court: Certainly.

Mr. Stoel: We have not examined this in detail, so we are uncertain as to just what we might want to take out.

The Court: You may proceed, Mr. Biggins. [111]

Mr. Biggins: Well, I might offer No. 54.

The Court: No. 54 will be admitted as to those pages, unless you have an objection?

Mr. Stoel: Our objection to this goes to the same

(Testimony of William L. Brewster.)

point, your Honor, that there is no question of the authenticity of these documents now, but we do question their relevancy on the question of intent, and for the same reason that we objected to the original tax returns as not indicating that there was ever any communication of the intent whatever it may be, however it may be evidence here, to the Union Trust Company.

The Court: The objection is overruled. Now, if you would identify the individual pages, then, the whole number, then, starting with 54 through the alphabet, or starting with A, 54-A.

Mr. Biggins: That will be the unmarked journal pages appearing between Page J-26 and Page No. J-27.

Mr. Fraser: Your Honor, may I inquire whether we are starting to mark these 54 or 54-A?

The Court: 54-A, and then the next one in my thinking should be -B, -C, as to the pages that you actually offer that actually are received in evidence.

Mr. Biggins: Next, the unnumbered page styled within the group of ledger pages called Office Building Site, the third page over where it is written "Real Estate Parcel A" and the following page, "Leasehold Parcel B," and the third page——[112]

The Court: Are you marking those as you go through now, Mr. Biggins, so that we can get proper identification? That will be 54-B.

Mr. Biggins: The Leasehold Parcel B will be 54-C, which I am marking in pencil in the upper

(Testimony of William L. Brewster.)

right-hand corner in the blank space called Account Number, and the next one will be 54-D, which is written "Building, American Bank."

Turning over past the next slip called "Sinking Funds," the account which is numbered 75, I am marking for identification as 54-E, and it is styled, "Land Trust Certificates 1350 @ Call 1050, Interest Payable February 12th, August 1st (See Offset A/C 33)"; then after that "Interest 5½ Per cent."

And the following page, which I have marked 54-F, which is styled "Land Trust Certificates."

I offer exhibits marked for identification, your Honor, 54-A through 54-I, understanding that opposing counsel may include any other of these pages as he sees fit.

The Court: You were down to -F, I believe. Have you advanced to -I? I didn't get it.

Mr. Biggins: Yes.

Mr. Stoel: Your Honor, when he is finished offering these, I wonder if we can have a short recess where we could examine these pages he has designated now?

The Court: We will proceed now, Gentlemen, and then we can withhold the offer until such time as we have a recess. [113] We will have a recess in about half an hour.

Mr. Biggins: Could I ask the witness, if the Court please, to examine these documents that I have just made the offer on?

The Court: You have not had an opportunity to examine these?

(Testimony of William L. Brewster.)

Mr. Stoel: No; we have not examined these, your Honor.

The Court: We will have a ten-minute recess.

(Recess taken.)

Mr. Biggins: If the Court please, the Government offers into evidence exhibits marked for identification No. 52-A through 52-G, which are these annual reports of independent certified public accountants for the years 1927 through 1933, inclusive, marked -A through -G, which I believe is for the years 1927—excuse me, may I see that—yes, for the years 1927 through 1933 marked for identification as Exhibits 52-A through -G, inclusive.

Mr. Fraser: If your Honor please, at this time the plaintiff will make the general objection to the receiving in evidence of the exhibits described by Counsel for defendant, on the ground that these exhibits as to this defendant constitute hearsay; on the further ground that, with the exception of the report marked 1927, that material, in our opinion, is irrelevant because of their remoteness and, further, because they are prepared by somebody that is not an officer or associated with the [114] company.

Then I make the further objection to the receiving of these documents, on the ground that if they are being offered for the purpose of showing general intent on the part of the three parties involved in the transaction, which the evidence has conclusively established at this time that is the only pur-

(Testimony of William L. Brewster.)

pose that they could be received for, your Honor, would merely bear upon the intent of one party, Building Syndicate Co. They would not be any evidence, in the absence of further foundation, of intent of Lumbermens Trust Company or Union Trust Company.

The Court: Is there any question as to the authenticity of the reports?

Mr. Fraser: There is none, your Honor.

The Court: Did the reports come from the files of the plaintiff?

Mr. Fraser: They did.

The Court: They will be admitted.

(Thereupon, the photostatic copies of journal and ledger sheets above described and previously marked Defendant's Exhibits 52-A through 52-G, inclusive, were received in evidence.)

Q. (By Mr. Biggins): Mr. Brewster, during the recess have you had a chance to look at the pages in the books of the company's general ledger and journal which I have identified and that [115] have been admitted as Exhibits 54-A through -F?

A. Yes; I glanced at the pages.

Q. May I have these annual statements?

The Court: 52-A through -G.

(Documents presented to Counsel.)

Q. Is it not true, Mr. Brewster, that on the books of Building Syndicate, as set forth in Ex-

(Testimony of William L. Brewster.)

hibits 54-A through 54-F, the complete ledger on the table, that the entire interest of the property purchased from Northwest Bank was listed as an asset of Building Syndicate as set forth in its books?

Mr. Fraser: I will object to that question, your Honor, on the ground that the record should speak for itself. It calls for a conclusion.

The Court: Let me have the question.

(Question read by the Reporter.)

The Court: The witness has stated that he knows something about it and he has had experience in it. On the other hand, I do not believe, since he is an adverse witness, that you would be entitled to his opinion on the matter; therefore, the objection is sustained. This would be in the nature of opinion evidence, I believe.

Q. (By Mr. Biggins): Looking at what has been introduced in evidence, Mr. Brewster, as 54-A, would you care to see the document if the Court permits you to step from the stand?

The Court: Yes, you may step down. Can't we remove those [116] pages and get them in evidence?

Mr. Biggins: I am afraid if I undertake to do it it will just create a mess.

The Court: All right.

Mr. Biggins: Examine 54.

(Witness inspects exhibit.)

Q. (By Mr. Biggins): You see after I read:

(Testimony of William L. Brewster.)

"Building Syndicate. Portland, Oregon. Proposed Depreciation and Amortization Entries. As of December 31, 1927. For American Bank Building"——

And now the crucial language:

——"Conforming to Conclusions and Instructions of Directors—at February 9, 1928, as Per Letter of Authorization by A. R. Watzek, President."

Do you see that language, sir?

A. I do.

Q. In your search of the books and records and files of the corporation, have you been able to find a letter of Mr. Watzek dated February 9, 1928?

A. No.

Q. Do you have any doubts that, as custodian of the records of this company, that this document identified and admitted in evidence as 54-A does truly set forth the conclusions and instructions of the company's president?

Mr. Fraser: May I ask a question? [117]

The Court: The objection is sustained.

Q. (By Mr. Biggins): Analyzing Exhibit 54-A, Mr. Brewster, does this document show that depreciation is and has been claimed on the total purchase price paid for the property?

Mr. Fraser: Before the witness answers the question, may I ask a question in aid of objection?

The Court: Yes; you may.

Mr. Fraser: Mr. Brewster, were you in any way associated with the Building Syndicate in 1927?

The Witness: No; only indirectly. I was an

(Testimony of William L. Brewster.)

employee of Strong & MacNaughton Trust Company, which firm was employed to manage the building. They would rent the space.

Mr. Fraser: Did you have anything whatsoever to do with the transaction that we are discussing in court today?

The Witness: Not at all; not at that time.

Mr. Fraser: In view of that fact, your Honor, I would like to object to further inquiry from this witness, on the ground that any question that might be asked him pertaining to the placing of entries on any record might merely be his opinion.

The Court: Objection sustained.

Mr. Biggins: I will concede he is not a competent witness on that.

Q. You are familiar, I believe you said, with the annual accounting reports of three separate C.P.A.'s that have reviewed the books and records of this Building Syndicate? [118]

A. As I recall, I first saw those audits in 1932 when they were turned over to my employer, at that time Robert Strong, and when we assumed, Robert Strong and I as his employee assumed the management of the property, we signed a receipt to the Commonwealth Trust and Title Company at that time, and among other documents these audits were turned over to us. That's the first time I recall ever having seen——

Q. You do know as a matter of fact that all of these reports by three C.P.A.'s establish the total

(Testimony of William L. Brewster.)

purchase price as assets of the building; you know that? A. No; I would not.

Q. Do you know that they all set up the Land Certificates as liability of the company?

A. I——

Q. If you don't know, that is all right.

A. I don't know, no, as to that.

Q. Reading to you from one statement in the annual report prepared for 1930 by I. D. Wood & Company, I will read a statement, Mr. Brewster, and ask you if you know the facts, conversations or documents upon which this statement is based?

Mr. Fraser: Counsel, before you proceed, may I ask what year?

Mr. Biggins: Excuse me, I thought I said 1930. It is Exhibit 52-D, Page 4.

Mr. Fraser: Your Honor, may I make an objection at this [119] time on the ground of relevancy, competency and materiality, for the principal reason that matters and things transpiring after 1927 and possibly the first part of 1928 do not have a probative value with respect to the intention of the parties in 1927?

The Court: The objection is overruled.

Mr. Biggins: I am going to read a statement and then ask you a question, Mr. Brewster, from Page 4 of the annual report of the C.P.A. where it says:

"Land Trust Certificates, $1,229,629.62—The title to the building site, the leasehold and the building is held in the name of these certificate holders.

(Testimony of William L. Brewster.)

1,350 certificates or indivisible shares of equitable ownership and beneficial interest in the above assets were issued and an amount of $1,250,000 or $925-.926 per certificate realized."

Now, the crucial sentence, Mr. Brewster—this is under the Land Trust Certificates:

"These certificates in their intent represent an indebtedness of the corporation and not an evidence of ownership."

Do you know of any documentary source in your custody of the books and records of the company that supports this statement or where it came from?

A. No. [120]

Mr. Biggins: That is all.

The Court: Do you have anything more, Mr. Stoel?

Mr. Stoel: Just one moment, your Honor. No; that is all, your Honor.

The Court: You may step down.

(Witness excused.)

Mr. Biggins: The Government rests, your Honor.

While they are discussing, if the Court please, I have made an offer to opposing counsel, if acceptable to this Court, that the Government has no objection to their examining the complete ledger at their leisure, sir, and inserting a page at any time. If the Court desires to keep the record open for that purpose, we have no objection.

The Court: 54-A through -G?

Mr. Biggins: -F, sir.

The Court: 54-A through -F. Have they been admitted?

The Clerk: You have admitted them, your Honor, but I had not marked them because they are still contained in the ledger account there.

The Court: Then we want to have those removed. Gentlemen, do you think there is anything in this particular book that you would want to use now?

Mr. Stoel: I think we would like the privilege of looking [121] through it, your Honor, before we close the record on that book.

Mr. Biggins: Very well; we have no objection on any addition of a document out of the book.

The Court: We will fix a time limit, then. You could do that some time during the latter part of this week, could you not?

Mr. Stoel: I am sure we could.

The Court: Then let us have the final closing, or if there is to be additional evidence on that additional point, say at 9:00 o'clock next Monday morning if we are to have additional evidence.

Mr. Stoel: That is satisfactory with me.

Mr. Biggins: I take it the testimonial evidence is closed now?

Mr. Stoel: We have not decided whether there is any rebuttal evidence, your Honor.

The Court: I think we should decide that, Mr. Stoel. I do not think we should decide this piecemeal. We have this one feature I think we should leave open.

Mr. Fraser: We are prepared to go ahead. We didn't want to create the inference we didn't want to make that decision right away.

The Court: Very well.

Mr. Biggins: We will have originals photostated and substituted for the originals. [122]

Mr. Stoel: Your Honor, we have no testimony of witnesses to offer in rebuttal. There have been marked here additional audit reports from the company's files as Defendant's Exhibits 52-H through -P, being the audit reports for the years 1934, '35, '36, '37, a second copy for the years 1937, 1938, 1939 and 1942, and we would like to have these a part of the record.

Mr. Biggins: We have no objection, your Honor. I was understanding the basis of objection was in far remoteness in time. That is why I confined the offer. If they want to withdraw their objection to remoteness in time, I will offer the whole bunch. I do not think they can cut both ways on that.

Mr. Fraser: Our purpose is that inasmuch as the other evidence was introduced, it is our position that these documents go to explain the intervening years. We would like to have you have the complete record.

Mr. Biggins: We have no objection.

The Court: That is -H through -P, 52.

Mr. Biggins: No objection, your Honor.

The Court: They will be admitted.

(Audit Reports above referred to for the years above referred to, previously marked

Plaintiff's Exhibits 52-H through 52-P for Identification, were thereupon received in evidence.)

The Court: Mr. Biggins, you will prepare a list of these [123] exhibits which will be attached to the pretrial order?

Mr. Biggins: It will be prepared today and given to the Court before leaving this afternoon.

Mr. Stoel: Your Honor, as additional evidence in rebuttal, we would like to enter the balance of the exhibits listed in the original pretrial order as it was filed here, and there are one or two errors in numbering here which I think we would like to straighten out, if I may.

The exhibits I am now offering are Supplemental Indenture of Lease listed in the pretrial order as No. 9, but it was mismarked No. 8.

The Court: That will be admitted as No. 9. We will mark it the same as in the pretrial order.

(The document above referred to, having been re-marked Plaintiff's Exhibit 9 for Identification, was thereupon received in evidence.)

Mr. Stoel: The next is Second Supplemental Indenture of Lease which is marked No. 9 but should be No. 10.

The Court: That will be entered as No. 10. Is there any objection to either of these? You have no objection?

Mr. Biggins: None at all.

The Court: They will be admitted.

(Document, Second Supplemental Indenture of Lease, having been re-marked [124] Plaintiff's Exhibit 10 for Identification, was thereupon received in evidence.)

Mr. Stoel: The remaining exhibits, your Honor, are Exhibit No. 15 in the pretrial order, being a printed letter from Building Syndicate to the holders of Land Trust Certificates, dated July, 1933, and Exhibit No. 16, a printed letter dated July 28th, 1938, the income bond of indenture between Building Syndicate and Portland Trust & Savings Bank, January 1, 1944.

That completes the plaintiff's case, your Honor.

Mr. Biggins: No objection.

The Court: They will be admitted.

(Documents above referred to, previously marked Plaintiff's Exhibits 15 and 16, respectively, for Identification, were thereupon received in evidence.)

The Court: Gentlemen, you have furnished rather complete trial briefs. You will have this other material that you may want to offer by next Monday. Do you feel that there is any necessity on the part of plaintiff of additional briefs?

Mr. Stoel: I think we would like to submit a brief since our trial memorandum was concerned primarily with the questions of property law rather than with the cases in the tax field, your Honor; whereas, the defendant's counsel, I think, was working primarily with income tax cases. I do not think the [125] two briefs are particularly——

The Court: Would you want to file a reply to the Government's brief?

Mr. Stoel: That would be satisfactory.

The Court: Then, in turn, if the Government has anything, you will have the privilege of replying to that, Mr. Biggins.

I do not want these facts to get away from me to the extent where I might have to secure a transcript, and I would like to ask that you have your answer in in ten days, Mr. Stoel.

Mr. Stoel: Thank you.

The Court: If you, in turn, Mr. Biggins, could get yours in—I realize the pressure that you are under, both of you gentlemen. Could you get it in within seven days after that time?

Mr. Biggins: I could put it in almost immediately, your Honor. If they could get a memorandum in, if I could suggest the 11th or 12th, I will work over the week end and have mine in by Monday, but then if I don't have it in by then, your Honor, I am in a whole week of jury trial.

Mr. Stoel: I think we can do that.

The Court: If you can do that, that will expedite the matter.

Mr. Stoel: Do you have any desire to have oral argument in this case, your Honor?

The Court: Of course, I can actually better decide that, [126] Gentlemen, after the briefs are in. I do not think so. I think that this is a case with the facts and the law actually in a field with which I have some familiarity, and I do not think, unless there are some particular points that the attorneys

feel that they could improve on by oral argument, I will ask for oral argument on it. After all, the briefs should cover those points. We will recess until 9:30 tomorrow morning.

(Trial concluded.) [127]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Gordon R. Griffiths, an Official Court Reporter to the United States District Court for the District of Oregon, do hereby certify that at the time and place mentioned in the caption I reported in shorthand all the testimony adduced and proceedings had in the above-entitled cause, that I thereafter caused my shorthand notes to be reduced to typewriting under my direction, and that the foregoing transcript, consisting of Pages 1 to 127, both inclusive, is a true and correct transcript of all testimony adduced and proceedings had in said cause, and of the whole thereof.

Witness my hand at Portland, Oregon, this 3rd day of August, 1960.

/s/ GORDON R. GRIFFITHS,
Court Reporter.

[Endorsed]: Filed August 5, 1960.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Pretrial Order, Opinion, Findings of Fact, Judgment, Notice of Appeal, Bond for Costs on Appeal, Stipulation and Order extending time for docketing appeal, Designation of contents of record on appeal, Statement of Points, Stipulation and Order for transmittal of original exhibits, and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 9887, in which Building Syndicate Co., an Oregon corporation, is plaintiff-appellant, and United States of America is defendant-appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellants, and in accordance with the rules of this court.

I further certify that there is enclosed herewith reporter's transcript of testimony, dated November 4, 1959, filed in this office in this cause, together with all exhibits.

I further certify that the cost of filing the notice of appeal, $5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 5th day of August, 1960.

[Seal] R. DeMOTT,
Clerk;

By /s/ MILDRED SPARGO,
Deputy Clerk.

[Endorsed]: No. 17037. United States Court of Appeals for the Ninth Circuit. Building Syndicate Company, an Oregon Corp., Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: August 8, 1960.

Docketed: August 11, 1960.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 17038

United States
Court of Appeals
For the Ninth Circuit

EQUITABLE LIFE AND CASUALTY INSURANCE CO.
Appellant,

vs.

VIRGIL N. LEE,
Appellee.

Appellant's Brief

Appeal from the United States District Court for the District of Oregon.

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No. 17038

United States
Court of Appeals
For the Ninth Circuit

EQUITABLE LIFE AND CASUALTY INSURANCE CO.
Appellant,

vs.

VIRGIL N. LEE,
Appellee.

Appellant's Brief

STATEMENT OF JURISDICTION

Appellant was sued by appellee in the United States District Court for the District of Oregon. In the complaint, plaintiff alleged various misrepresentations made by defendant's agents in connection with the sale of an insurance policy and asked for the sum of $3,000.00 general damages and the sum of $10,000.00 punitive damages (R. 3, 4, 5, 6). Appellant answered by a general denial (R. 7, 8). A pre-trial order was made and entered (R. 11, 12). Then an amended pre-trial order was made and entered. Defendant raised various defenses of waiver and affirmance and denied plaintiff's right to rescind the insurance contract (R. 13, 14, 15, 16, 17, 18).

Defendant's whole theory of defense was based upon the suit being brought by plaintiff to rescind the insurance contract and recover the premiums paid. Plaintiff by asking for $3,000.00 general damages plus interest on $1,000.00 at the rate of 6 per cent per annum from January 20, 1956, plus interest on $1,000.00 at the rate of 6 per cent per annum from January 20, 1957, and with interest on $1,000.00 at the rate of 6 per cent per annum from January 20, 1958, until paid, in effect asked to be placed in status quo (R. 5, 6). The premiums of $1,000.00 each were paid by plaintiff on each of the above dates. He was asking for a return of his money and at the trial plaintiff made tender of $100.00 in dividends received from defendant (R. 53).

All of this led defendant to believe that plaintiff was proceeding on a rescission theory. Many of defendant's defenses raised in the amended pre-trial order relate to a rescission action. Then, too, the leading case in Oregon on damages for fraud is *Selman v. Shirley*, 161 Or 582, 85 P2d 384, in which the Oregon Court subscribes to the "benefit of the bargain rule" as opposed to the "out-of-pocket" rule.

What plaintiff has really asked for in this case is rescission of the insurance contract. His damages then are limited to his "out-of-pocket" loss, for which he has asked. This amounts to $3,000.00 plus interest, which sum will not exceed the statutory amount of $10,000.00 necessary for diversity jurisdiction. Plaintiff is not entitled to punitive damages in a rescission action. For

these reasons the United States District Court for the District of Oregon lacked jurisdiction over this case.

This Court has jurisdiction over this case by reason of 1291 USC and 1294 USC.

STATEMENT OF THE CASE

In January, 1956, plaintiff purchased a 20-payment life insurance policy from defendant. Plaintiff now claims that various misrepresentations were made by agents of defendant which caused him to purchase this policy. Plaintiff paid three annual premiums at $1,000.00 each on the policy prior to the commencement of this action. Defendant claims that there was no fraud in the sale of the policy and in the alternative, contends that if there were actionable fraud in the sale of the policy, that plaintiff waived his rights by continuing with the policy and making payments thereon after receiving dividends and being informed of what dividends were expected to be paid on the policy.

STATEMENT OF FACTS

A Mr. Leo Rognlie, agent for Equitable Life and Casualty Insurance Co., first contacted the plaintiff, Dr. Lee, in the summer of 1955 (R. 32). According to Dr. Lee's testimony, he was first contacted about an accident and health insurance policy, he was not interested in that, but was informed by Mr. Rognlie of a profit sharing insurance policy, which would be a $16,000.00 insurance policy paid up in 20 payments, payable at the rate of $1,000.00 per year, considering Dr. Lee's age and health (R. 33).

From this profit-sharing policy, he would receive dividends over and above what an ordinary insurance policy might enjoy (R. 34). The doctor also mentioned something about stock splits, even though he knew he was not purchasing stock in the company (R. 35). He was left a book called "Hidden Ways to Wealth" by Mr. Myers, one of defendant's selling agents (R. 36). (Plaintiff's exhibit number 5.) Dr. Lee further testified that he was told that at the end of five to seven years, the policy would be self-supporting (R. 36). The plaintiff, in fact, got a 20-payment life insurance policy with a $16,074.00 face value for which he would pay $1,000.00 a year in premiums because he was 52 years of age at the time of issuance of the policy (R. 36). Any dividends left with the company would earn 3 per cent interest a year compounded annually (R. 37). The new policy was a profit-sharing policy in that the policy would participate in the profits of the company. Such profits would be composed of (1) savings in mortality, (2) profit from lapses, (3) interest in excess of reserve requirements, (4) savings from expense loadings and economy of management (R. 37, 38). Dr. Lee's testimony as to the representations made to him is that within a specified number of years, approximately seven years, closer to five, that this policy's earnings would be such that it would be self-supporting (R. 41). A first dividend would be payable by the company at the end of the second year the policy had been in force (R. 41). He further testified as to what dividend was represented

he would get. This started at 8 per cent and went as high as 11.9 per cent per year, representing, as he understood, the expected earnings of the company (R. 41). There was to be a total of 21.9 per cent paid to him which consisted of 10 per cent plus the 11.9 per cent for his age group (R. 42). The dividends payable were supposed to be accumulative on the premiums paid into the company. That is, at the end of the second year he would receive $219.00, at the end of the third year he would presumably receive $438.00, no dividend would be paid on the first year's premium. At the time the policy was delivered to Dr. Lee, Dr. Lee testified that he was told that he could anticipate very handsome dividends; the company was doing excellent business (R. 43). Dr. Lee further testified that he was given a yellow sheet of long hand computations concerning dividends before he bought his policy (R. 43). (Plaintiff's exhibit number 6.) He stated that Mr. Reklau, the general sales manager for the Portland office of the defendant, showed him the sheet or schedule (R. 43). Dr. Lee testified that he was told by Mr. Reklau that he (Reklau) anticipated 25 per cent minimum returns on this investment (R. 46). Figures on the sheet indicate that at the end of 20 years, Dr. Lee would get $443,373.00 for his investment (R. 47). The Court asked Dr. Lee if he did not get rather suspicious when Reklau was giving him these figures (R. 47). Dr. Lee replied that he was suspicious of the company and he tried to ascertain its position. He talked to representatives and financial advisors of

The First National Bank, the Weatherly Insurance Agency, the brokerage house of Foster & Marshall, and the president of the Underwriters Association, Mr. Sid Klein (R. 48). They advised him that he was either lucky or foolish; if it was valid, it was extremely good; if it was not, then it was not good (R. 48). The Court asked Dr. Lee if he really believed these representations and the witness, Dr. Lee, said in effect, "no" (R. 48, 49). In referring to the yellow sheet, plaintiff's exhibit number 6, Dr. Lee stated that Mr. Reklau used the various figures on the sheet to prophesize the future earnings of the policy (R. 51). By letter of January 20, 1958, from Lewis R. Rich, assistant secretary of defendant company, a $100.00 dividend check was sent to Dr. Lee (R. 52). (Plaintiff's exhibit number 8.) This letter stated that the dividend was 10% of the annual premium. Dr. Lee applied this check he received on January 20, 1958, to the payment of the third year's premium on the insurance (R. 52). A second dividend of $100.00 was sent by letter and check of January, 1959, to Dr. Lee (R. 52, 53). (Plaintiff's exhibit 17-b) (R. 52, 53). This letter also mentioned that the dividend was 10% of the annual premium. Dr. Lee states the first time he knew that the company was repudiating the statements made by Mr. Reklau with respect to dividends was in January, 1958 (R. 53). This was when the third premium was due and he had received his first dividend check of $100.00. After writing to the office and inquiring as to why the dividend earnings had failed to materialize,

Dr. Lee went ahead and paid the premium of $1,000.00 in January, 1958 (R. 53, 54). On cross-examination, Dr. Lee was asked about the dividend figures he had mentioned previously, and was asked upon what the agents based these figures (R. 55). He answered that the dividends would be forthcoming from the tremendous increase in business which was anticipated by the company from the volume of future business that it would do (R. 55). He was further asked: "In other words, this money that you were to receive by way of dividends was from anticipated earnings" (R. 55, 56). His answer was as follows: "Not entirely; that to begin with, the 3 per cent factor was in the policy, but the 8 per cent factor was there, that was, well, I believed he assured that we would—8 per cent would be about the minimum we would receive. This is verbal and not in writing; that is, I had no letters or documents from the agents or the company to sustain this, but I do have some words to that effect" (R. 56). This statement was supposedly made by Mr. Reklau (R. 56). Dr. Lee had purchased a second policy, this one for his minor son, one year after he had purchased his own policy (R. 56, 57). Dr. Lee states that he saw Mr. Reklau a number of times before he purchased his own policy (R. 57). Dr. Lee was then asked this question: "So you paid your third premium after knowing what your dividends were; correct?" Answer: "I had no way of ascertaining what my dividends were. I wrote to the company and asked what it was, and at the same time I received the denial of

all facts quoted to me." Prior to the time he received the $100.00 dividend, he did not know at any time that dividends that were represented would not be forthcoming (R. 59). The Court asked Dr. Lee the following question: "Then you wrote to the company for the statement as to where the other dividends were, and at that time you learned from them that there were no other dividends?" Answer: "That is correct, they denied the existence of any such rate schedule, the age group, or anything else of that nature" (R. 60). Officials from the State Department of Insurance were in his office twice asking questions and investigating the company during the summer and fall of 1957. After he talked with the State Insurance Department Officials, he paid the $1,000.00 premium for the third year of the policy (R. 60). After all this happened he was asked by the Court why he didn't write to the company first and ask them what the dividends were going to be. The witness in answer to this said: "Well, according to the way the information was given me, sir, they didn't know at the time, but it would be handsome. That was the expression used" (R. 60, 61).

Dr. Lee met with Mr. Ray R. Ross, General Sales Manager of defendant, on two occasions. The first time was late in 1956 or early in 1957 (R. 61). The second meeting with Ray Ross was on February 12, 1958, at Dr. Lee's office (R. 62). According to Dr. Lee's notes, Dr. Lee asked the following questions of Mr. Ross and received the following answers: "Are the dividends ac-

cumulative in successive years?" Mr. Ross answered, according to Dr. Lee's notes, "No, it can be—that is, $100.00, 10 per cent, or $200.00 the second year or whatever it happens to be in an increase as the shares of the unit came into effect. Now it can be 3 per cent as the policy indicates, if necessary. The dividend is 10 per cent at present or $100.00 per year regardless of the amount paid in; no earnings the first year due to the cost of handling the policy and such things as records in a business way. It might increase to 46 per cent dividend within the next two or three years, as in the case of the company in Oklahoma." The second question was, "Does the policyholder have any possibility of recovery of funds paid in when the policy was so old with fraud and misrepresentation by the district agent or agents of the company?" "No," was his answer, "the company is not responsible for any statement made by its general agent or agents regarding the fraudulent or misleading statements. The policy contains a clause protecting the company against any such act or acts" (R. 62, 63). At (R. 63, 64) Dr. Lee testified under cross-examination that the yellow sheet, plaintiff's exhibit number 6, applied to each individual policy separately. He also said that the same profit-sharing rate of earnings was to apply to both policies individually (R. 63). Earlier, he testified that the dividends on his son's policy because of his age group would be 7.7 per cent in addition to the regular 10 per cent dividend and that the earnings on his policy would be 11.9 per cent plus the 10 per cent, or 21.9 per cent (R. 42). Then

he states that the same profit-sharing rate of earnings was to apply to both policies individually (R. 63). He had said earlier that the yellow sheet was for both policies together (R. 43). Asked about the yellow sheet again, he says: "I remember certain figures there. I did not keep the sheet. I didn't have time for that. It was shown to me from that. The explanation of the potential and possible earnings of these policies and the volume of company business was projected for my benefit" (R. 64). Dr. Lee reaffirms that the schedule was shown to him by Reklau before he bought his own policy (R. 64).

Cecil I. Hust was the next called on behalf of plaintiff (R. 66). He testified that he started working for Equitable Life & Casualty Co. in September, 1954, and was with the company until the middle of 1957, or January, 1957 (R. 66). On cross-examination, Mr. Hust testified that the yellow sheet, plaintiff exhibit number 6, was given out by Mr. Reklau shortly after the company moved its offices to 32nd and Burnside Street in Portland (R. 69).

Dr. Lee was then recalled to the stand for continued cross-examination. He admitted that all of the figures set forth in his notes relating to profits would have come from anticipated earnings (R. 71, 72). Dr. Lee stated that he didn't really rely upon the yellow sheet, plaintiff's exhibit number 6 (R. 72). He read his policy when he received it and recalled that the Board of Directors determined what the dividends would be, and that the

policy was silent as to what the dividends would be (R. 73).

Neil D. Nadeau was next called in behalf of the plaintiff. He testified that he went to work for Equitable Life & Casualty Insurance Company in August or September, 1956, at 32nd and East Burnside Street in Portland, Oregon (R. 77). He testified he was given the pitch sheet, plaintiff's exhibit number 6, the day he went to work for Mr. Reklau (R. 77).

Don Pruitt was next to testify in behalf of the plaintiff. He was employed by Equitable Life & Casualty Co. from 1953 until the summer or fall of 1957 (R. 78, 79). According to Mr. Pruitt, he was present at several meetings with Mr. Ross in which the 20-payment life and profit-sharing policy was discussed (R. 79). During all of the time with the company, he never saw a document similar to plaintiff's exhibit number 6 (R. 80). When he first went with the company, Don Pruitt was shown a sheet showing the record of a policy issued by Kansas City Life Insurance Company and this showed that Kansas City Life Insurance Company paid dividends starting at 25 per cent for the first dividend and increasing 15 per cent a year to the end of the 20-year period. The witness, Don Pruitt, stated Ray Ross had made a statement that his company would pay at least as much in dividends as was paid by Kansas City Life (R. 80). Don Pruitt estimated that under these circumstances the policy would become paid up at the end of the 8th year (R. 81). He thought plaintiff's exhibit number 6

was passed out about the same time that he, Don Pruitt, left the company, or shortly thereafter (R. 81, 82).

Leo Rognlie was called as the defendant's first witness. Mr. Rognlie started working for Equitable Life & Casualty Co. in October, 1955 (R. 83). He was selling health and accident policies (R. 83). He first contacted Dr. Lee in December, 1955, or January, 1956 (R. 84). Mr. Rognlie saw Dr. Lee twice, alone. The first time they talked about an accident and health policy; the second time they discussed the profit-sharing program (R 85, 86). In a week or ten days after that, Mr. Reed Myers went with Mr. Rognlie to see Dr. Lee at Dr. Lee's office (R. 86). At this meeting, Dr. Lee was shown a specimen policy (R. 88). Mr. Rognlie and Mr. Myers showed Dr. Lee a copy of "Dunn's Reports", containing ratings of other companies who had a profit-sharing policy, the same kind as offered by Equitable Life & Casualty Co. These policies had paid out in six, seven, eight, or nine years (R. 88). It was at this meeting that Dr. Lee informed Mr. Rognlie and Mr. Myers that he had investigated the company (R. 89). Mr. Reklau was not at any meeting with Mr. Rognlie and Dr. Lee prior to Dr. Lee's signing his application for insurance (R. 89). Mr. Rognlie was the one who introduced Mr. Reklau to Dr. Lee and this was at least a month after the sale had been made (R. 89). Mr. Rognlie first came into contact with the long schedule known as plaintiff's exhibit number 6 in April or May of 1956 (R. 90). The schedule related to what could happen if a stock pool was set up

and a certain percenatge of dividends were put in the stock pool (R. 90, 91). This schedule related to a stock pool and not to the 20-pay life policy earnings as such (R. 91). In the summer of 1956, Mr. Rognlie discussed a profit-sharing policy for Dr. Lee's son (R. 92). At that time he brought Mr. Reklau with him to Dr. Lee's office and introduced the two men (R. 92). An application was made out for his son for the same amount in premiums as for Dr. Lee (R. 92). It was explained to Dr. Lee at the time Dr. Lee's policy was sold that the first dividend would be due at the end of the second year of policy (R. 92, 93). It was mentioned to Dr. Lee that a 10 per cent dividend had already been decreed by the Board of Directors. This would be for the policy year of 1956 (R. 93). In anticipating what Dr. Lee's policy might earn, it was mentioned to him what other companies had done on profit-sharing policies in the past (R. 94).

Next to testify for the defendant was another selling agent, Osborne R. Myers. He began working for the company in June, 1954 (R. 99). He started selling the profit-sharing policy for the company which had recently been approved by the State of Oregon Insurance Commissioner (R. 99). Mr. Myers testified that the first contact was made with the plaintiff, Dr. Lee, in December, 1955. Mr. Myers explained the profit-sharing program and contract to Dr. Lee, that the purpose of selling profit-sharing contracts was to place them with people of influence in the community so that the com-

pany in selling regular, ordinary types of insurance would be able to use these names for references (R. 100, 101). Every insurance company of any type at some time or another in order to expand has had to place out a certain number of these profit-sharing contracts (R. 100, 101). Mr. Myers told Dr. Lee that no company could guarantee a profit, but that the company did expect to pay a 10 per cent dividend to start (R. 103). To the best of his knowledge, the premium paid for the policy was standard for a 20-pay life policy insuring a person of age 52. (R. 104, 105). At the second meeting with Dr. Lee, Dr. Lee had a copy of "Best's Reports." This book gives a complete breakdown of every insurance company in the business. At this time, there were only two or three million dollars on the books for Equitable Life & Casualty Company. Mr. Myers explained to him this was the reason the contracts were being placed so as to get more business, and as the company grew he would share in the profits proportionately (R. 107). The company stopped writing the profit-sharing policy in September or November in 1957, there were only to be a limited number of the policies issued (R. 108). Mr. Myers explained accumulative dividends. If the dividends were put back in the company, they would draw interest and the policy would pay out in a much shorter length of time (R. 86). Otherwise, if the dividend is taken out every year, the policy has to take 20 years to pay out (R .109). It was to be a straight 10 per cent dividend on the current year's premium. As the

business would increase and profits would be more, profit-sharing contracts would receive more in the way of dividends (R. 109). Mr. Myers testified that he never used the yellow sheet or schedule, plaintiff's exhibit number 6, and Dr. Lee's information concerning this came through his personal contacts with Mr. Reklau after he had taken out the policy for himself (R. 110). Dr. Lee later bought a policy for his son.

Mr. Raymond R. Ross, assistant general manager and superintendent of agents for the Equitable Life & Casualty Co., was next to testify on behalf of the defendant (R. 115, 116). Mr. Ross testified that he first met Dr. Lee in October, 1957, at Dr. Lee's office (R. 116). Mr. Ross had come to talk to Dr. Lee because of some correspondence they had had concerning the insurance policy and also a $2,000.00 investment that Dr. Lee had made with Mr. Reklau, personally. Dr. Lee had supposedly given Mr. Reklau $2,000.00 to purchase stock, and he was concerned about it (R. 116, 117). At this meeting Mr. Ross told Dr. Lee the size of the dividend, 10 per cent, and that they were not accumulative on premiums paid. He further told him that dividends could not be guaranteed, as it was impossible to guarantee future earnings of the company (R. 118). At this point Mr. Ross testified that Dr. Lee said: "All right, I now have three months to decide whether or not to make my next premium payment" (R. 119). Subsequently, Dr. Lee did make his next premium payment after receipt of a 10 per cent dividend (R. 119, 120). Dr. Lee did not

mention the plaintiff's exhibit number 6 projection schedule to Ray Ross during that meeting in October, 1957 (R. 119). Mr. Ray Ross visited again with Dr. Lee in about February of 1958; this was one month following the first dividend payment and third premium payment (R. 119). They discussed the $2,000.00 that he had given to Mr. Reklau and no discussion was had about the dividends payable on the policy. In October of 1957, Dr. Lee asked Mr. Ross' opinion in regard to when the policy would be paid up. Mr. Ross said that most participating policies pay up in approximately 16 or 17 years, but because of the special features of this policy, there was a good likelihood it would pay up in approximately 14 years (R. 120). To Ray Ross' knowledge, when the company received the third year premium payment in January of 1958, there was no letter accompanying it from Dr. Lee (R. 121). The letter from Dr. Lee concerning dividends was received by Mr. Ross prior to his first meeting with Dr. Lee, which meeting was held in October, 1957 (R. 121). The testimony of Neil Nadeau concerning when the long projection sheet first came out is incorrect as indicated by the testimony and records as to when Mr. Nadeau first went to work for Equitable Life & Casualty Co. (R. 122, 123).

Equitable Life & Casualty Co. used the Commission Standard Ordinary Table of 1941 for the 20-payment life policy that it issued (R. 124). This is the same table used by New York Life Insurance Company at that time (R. 124). Under this table, the rate for Dr. Lee

was $62.21 per thousand, and this was what was charged as premium (R. 125).

Mr. Frank T. Wetzel was called as the next witness in behalf of the defendant. Mr. Wetzel is General Counsel for the Equitable Life & Casualty Insurance Co. He was with Mr. Ross when the meeting was had with Dr. Lee in October of 1957 in Portland (R. 131). Mr. Wetzel's main interest in the meeting was to see whether the company was involved in the $2,000.00 Dr. Lee had given to Mr. Reklau (R. 131). Mr. Wetzel listened to the conversation as Mr. Ross explained Dr. Lee that the only dividend authorized was a 10 per cent dividend, that is 10 per cent of whatever the annual premium was. It was made quite clear to Dr. Lee that it was not paid on an accumulative premium, but only on an annual premium. This appeared to at least be disappointing or perhaps shocking to Dr. Lee. Dr. Lee said he didn't know what he was going to do about it, but he had several months to think about it. The premium was not due until the first of the year, which gave him probably three or four months to decide what he wanted to do (R. 132).

SPECIFICATION OF ERRORS

(1) Finding of Fact II is erroneous in that the amount in controversy did not exceed $10,000.00. The action is in the nature of a rescission of the insurance contract in which case punitive damages are not recoverable.

(2) Finding of Fact IV is erroneous in that no such representations were made and the Finding is against the weight of the evidence.

(3) Finding of Fact V is erroneous in every detail; the representations made were not material, false, and known by the agents to be false and were not made knowingly and willfully, and such representations, if made, were not within the scope of employment of the agents, and the Finding is against the weight of the evidence.

(4) Finding of Fact VI is erroneous in that plaintiff did not rely upon these representations. Further, such representations were not made. Plaintiff relied upon the advice of others; insurance brokers, stockbrokers and bankers. This Finding is against the weight of the evidence.

(5) Finding of Fact X is erroneous in several respects. The action filed was not a damage action as that action is understood by the law of Oregon. Further, plaintiff did not affirm the contract, by paying another premium after discovery of fraud, rather, he waived the fraud, if any, and all his rights to recover for fraud.

(6) Finding of Fact XI is erroneous as not proved by the weight of the evidence. Punitive damages against a corporation are not allowable in this kind of a case, where the only fraud alleged is by selling agents of the corporation.

(7) Conclusion of Law I is erroneous for reasons heretofore and hereafter set forth in The Statement of Jurisdiction.

(8) Conclusion of Law II is erroneous in that plaintiff by his conduct after learning of the alleged fraud waived his rights to sue for fraud. Further, defendant still contends that the action brought was in rescission.

(9) Conclusion of Law III is erroneous for the same reasons set forth in Specification of Error 6.

SUMMARY OF ARGUMENT

(1) This action brought by the plaintiff is a rescission action for the recovery of premiums paid on a life insurance policy, all as evidenced by the Pleadings, Pre-Trial Order and Proceedings had during the trial of the case. Plaintiff is not entitled to obtain puntive damages in addition to a rescission of the insurance contract. The amount in controversy under the rescission action is $3,000.00, therefore the Federal Courts lack jurisdiction in this case because the amount in controversy is less than $10,000.00.

(2) Plaintiff is not entitled to change the theory of his case from rescission to an action for damages for fraud after the Pleadings are complete, Pre-Trial Order has been entered and trial of the case has been had.

(3). The Findings of Fact and Conclusions of Law are not supported by the evidence.

(4) A corporation is not liable in punitive damages for the wrongful act of its menial agents, in this case

the salesmen, unless such act was authorized or ratified. There is no evidence in this case of authorization or ratification.

(5) Plaintiff, since his alleged discovery of the alleged fraud or misrepresentation, has by his course of conduct affirmed his insurance contract with defendant and can no longer elect to rescind the contract.

(6) Plaintiff has not attempted to make restitution to defendant by tendering up to defendant the $100.00 dividend received and the insurance policy on his life, and therefore, plaintiff is not entitled to rescission of the insurance contract.

(7) Plaintiff, by his course of conduct since his alleged discovery of the alleged fraud or misrepresentation, has waived any fraud or misrepresentation of defendant's salesmen in the sale of the insurance policy to plaintiff, and therefore plaintiff not now is entitled to rescission of the insurance contract.

(8) Plaintiff has failed to act promptly in rescinding the insurance contract upon his discovery of the alleged misrepresentations of defendant's salesmen and is no longer entitled to rescind the contract.

(9) Plaintiff did not rely upon the representations of the selling agents in entering into the insurance contract with defendant.

ARGUMENT

(1) This action brought by the plaintiff is a rescission action, for the recovery of premiums paid on a life insurance

policy, all as evidenced by the Pleadings, Pre-Trial Order and Proceedings had during the trial of the case. Plaintiff is not entitled to obtain punitive damages in addition to a rescisson of the insurance contract. The amount in controversy under the rescission action is $3,000.00, therefore, the Federal Courts lack jurisdiction in this case because the amount in controversy is less than $10,000.00.

The argument against jurisdiction in this case is the same as the argument contained in The Statement of Jurisdiction of this case.

(2) Plaintiff is not entitled to change the theory of his case from rescission to an action for damages for fraud after the Pleadings are complete, Pre-Trial Order has been entered and trial of the case has been had.

The theory of the case was one of rescission throughout. The question was expressly left open at the end of the hearing of the case whether plaintiff had waived the fraud so as to preclude him from recovering. The questions discussed were whether he had a right to rescind (R. 137-143). Plaintiff said he was prepared to return the $100.00 which he received from the company (R. 53). This indicates that plaintiff and plaintiff's attorney thought it was a rescission action when the case was tried.

(3) The Findings of Fact and Conclusions of Law are not supported by the evidence.

The Court found that there was fraud in the sale of this insurance contract, and further found that there had been no waiver of the fraud by the plaintiff.

It is axiomatic that the layman's sense of grievance is not coterminus with an invasion of legal rights.

The burden of proof is on the plaintiff to prove fraud by a preponderance of the evidence. *Sheppard v. Blitz*, 177 Or 501, 163 P2d 519. The question before this Court is "Was there actionable legal fraud in this transaction?" *Herman v. Mutual Life Insurance Company of New York*, 108 F2d 678, 127 ALR 1464, is a case in which an action was brought by Max Herman for breach of contract and avoidance of an annuity policy. The facts of that case as set forth by the Court are essentially as follows: "The plaintiff purchased insurance from the defendant company in May, 1932, for a single premium of $60,745.71. That insurance was in the form of a policy known as an 'Annuity Certain Followed by Deferred Life Annuity.' The sale was made by a duly authorized agent of the company, who, in what might almost be called the duly authorized manner, presented his prospect with a rather complicated table of figures in five columns and an accompanying textual explanation. This table showed the insured how he could withdraw $300.00 a year for 19 years (duration of the annuity certain) to augment his guaranteed income of $3,300.00 and still be able to include in his coverage a five-year retirement income contract to begin at the age of sixty-four. These withdrawals were to be made from the dividends which are a usual feature in mutual insurance contracts. Huebner, Life Insurance, P. 379. The dividend amounts are set forth in column

one and in the following explanation their total appears under the caption 'income from dividends per 1932 scale.'

"The plaintiff paid his premium, accepted his policy, and enjoyed its benefits for six years. At the end of that time, no doubt in a moment of depression, he compared the dividends he had received, $2,180.69, with the corresponding figures, $4,412.93, appearing in column one above referred to. He then seems to have emitted a figurative cry of distress at the discrepancy of $2,232.21 thus appearing."

The Court goes on in pages 679 and 680 of the opinion to discuss the facts necessary to support rescission of the contract and states:

> "Rescission may be had because of mutual mistake on his part and the company's part or because of representations innocent or otherwise flowing from the insurance company to him. Further, he must proceed with reasonable promptness. Rescission for mistake will not lie here because mistakes relieved against do not lie in the field of prediction. They must be as to present and existing facts. We can also dismiss any idea of fraud and so of fraudulent representations. There is no assertion whatever that the agent acted in anything but the best of faith in submitting his columnar analysis.
>
> "Do these innocent (and here even non-negligent) but, in the event, mistaken figures furnish ground for rescission? The weight of authority does not stress the moral angle in granting rescission in equity at least. Williston on Contracts, Section 1500, Page 41, 89, 23 Am. Jur. Sec. 134, Page 931, 17 CJS, Contracts Sec. 147, Page 502, and cases cited thereon. There are, however, two reasons which on both principal and authority, fortunately,

preclude recovery here. Each go to the character of the representation and in truth each one in substance makes the representation less than that. In other words, and in the terminology of the American Law Institute, the 'misrepresentation' is rendered 'immaterial'. 2 Restatement of Contract Sec. 476 (1).

"Plainly, all statements must be considered against their background. If that background precludes reliance by the recipient no wrong to him follows from their eventual unreliability. The preclusion here is not single, but double. *It arises, first, from the character of the insurance business and, second, from the difference between present fact and future prophesy*. The cases hold, and sensibly, we think, that statements as to accumulations, dividends, surplus, etc., made in the sale of life insurance are mere illustrations or estimates and their subsequent inaccuracy is no ground for redress. Cf. 2 Restatement of Contracts Section 470 (2). They are collected in an excellent note in 22 ALR 1284." (Emphasis supplied.)

The Court in the Herman case quoted from a Pennsylvania case, *Grange v. Penn Mutual Life Insurance Company*, 235 Pa 320, 321, 84 At 392, 396.

"'* * * he, (the assistant secretary) said that, 'on a fifteen year policy for $25,000.00, the insured beginning at the age of 41 would receive at the end of the term a paid-up policy for the same amount and an estimated sum of $7,800.00 in cash, and that, while they always put the word "estimated" in, witness could rely on getting the amount named; that it was the rule of the company to be always on the safe side, and never to put out an inflated estimate * * *'

"Counsel for the appellant contends that these statements of the assistant secretary of the company were misrepresentations of material facts and that the company should be held responsible to him on damages for the deceit which he alleges was practiced. But with respect to this matter the trial judge found that the evidence of misrepresentation was not sufficiently clear, precise and indubitable to demand a reformation of the policy, and that the misrepresentations were concerned with matters which were the subject of estimate merely, and not of concrete fact, and therefore, they do not support the appellant's allegation of fraud in the making of the contract. He further held that it was not within the power of the assistant secretary to bind the defendant company by any representation, in such a manner as to give to the plaintiff any advantage over other policyholders in the company. The Court also found that the representation made by the assistant secretary, that the estimate was based on the past experience of the company, did not constitute such deceit as would justify recovery of damages by appellant, or would entitle him to an accounting by the company. These conclusions seem to us to reasonably follow from the evidence concerning the matter in question."

Continuing the quote from the Herman case at Page 681:

"The cases also hold, and again sensibly, we think, that erroneous assertions of future fact are not actionable in the absence of *a showing of knowledge of falseness*, 23 Am Jur, Section 35, 36, Pages 794-798; 17 CJS Contracts, Section 157, Page 509; Cf. 2 Restatement of Contracts, Section 474 * * *" (Emphasis supplied.)

"Our interpretation avoids any question of the reasonable promptitude requisite to the right of

rescission. The text books and writers make that, as the qualifying adjective suggests, a matter of the circumstances of each case. 17 CJS, Contracts, Section 432, Page 914; Williston on Contracts, Section 1526, Pages 4273 etc.; 1526, Page 4273 etc.; 4 Cooley Briefs on Insurance (2d Ed.) 4711-4716; 2 Black, Rescission and Cancellation, Section 478. Here the plaintiff discovered the alleged misrepresentation in 1933 when he received the first dividend in an amount some $150.00 less than column one predicted. He waited five years and received five more 'short' dividends before demanding and obtaining his new and presumably more satisfactory policy. Even under the stricter English Rule this would seem a pretty long time. A mutual insurance company must make calculations based on certainty and overhanging rescissions are not conducive to stability. However, the element of circumstance is difficult to appraise from the face of the pleadings and we need not do so. We spoke earlier of the complaint's reference to 'promise'. It requires a straining construction to give the use of that word therein its ordinary meaning. This because the context indicates its selection in the same sense as its accompanying 'statement' and 'representations'. Conceding, however, a broader meaning of warranty and the right to rescind for breach thereof, 5 Williston on Contracts, Section 1462, Page 4089, the plaintiff is no further forward. We have pointed out two fatal vices in the statement qua representation. It is probable that what we are about to mention constitutes an additional vice. But whether it does or not, it is an absolute bar to any action, qua breach. 5 Williston on Contracts, Section 1630, Page 4560. Any such promise with respect to a life insurance contract in a mutual company, is 'illegal and void'. The nature of mutuality prescribes it and we hardly need the explanation of the Pennsylvania Supreme Court in the case above cited.

That Court said, 'It will not do to construe the contract in this case an agreement by which the company was bound to guaranty to appellant a certain definite amount of surplus. That was something which from the circumstances, the future alone could determine. *It depended, for one thing, largely upon a number of lapsed policies, which could not be foretold.* The company is a mutual one, and its accumulations all the policyholders had the right to share in the proportions fixed by the terms of their contracts. Whatever representation may have been made to appellant, he is and can be entitled to nothing more than his proportionate share of the surplus which actually accrued. It is obvious that a mutual insurance company cannot discriminate among its policyholders, and any agreement which would result in the payment of the larger proportionate dividends to one of its policyholders than to others in the same class, would be illegal and void.' Grange v. Penn Mutual Life Insurance Co., 235 Pa 320, 321, 84 At 392, 396. (Emphasis supplied.)

"We question any real innocence on the part of plaintiff here. *Dividend is a widely known technical term and is relative to problematical earnings and not absolute to the payment of fixed sums.* See Kehl, Early American Dividend Law, 53 Harvard Law Review 36. Even assuming, however, a greater excusableness, the public policy is, we think, against relief from the transaction, 17 CJS, Contracts, Section 272, Page 656. It might be noted that the right to rescind for breach of warranty is also subject to the laches rule. 5 Williston on Contracts, Section 1463, Page 4092." (Emphasis Supplied.)

As might be expected from the above quoted portions of *Herman v. Mutual Life Insurance Co. of New York*, supra, the Court found that the plaintiff had no right

of rescission of the original insurance contract and in fact found no material misrepresentations. Looking at the insurance policy in question in our case, it is a profit-sharing policy in "an old line capital stock legal reserve company" and the profit-sharing consists of the right to participate in the profits of the company. Such profits shall be composed of (1) savings in mortality, (2) profits from lapses, (3) interest in excess of reserve requirements, and (4) savings from expense loadings and economy of management. This profit-sharing policy in an old line capital stock reserve company is very similar to dividends expected to be received by members of a mutual insurance company. The number of lapsed policies cannot be foretold and the savings in mortality, savings from expense loading and an economy of management and savings or profits from interest in excess of reserve requirements cannot be foretold in advance. The statements of the agents made to Dr. Lee were mere prophecies of what might happen, based on experiences of other companies and, of course, they were dependent upon the profits of the company from the various items mentioned. No one could say in advance what those profits would absolutely be, but only estimates could be made. The doctor should certainly have been aware of this. It has not been shown that the agents knew they were making false representations in the sale of the policy.

Grange v. Penn Mutual Life Insurance Company, 235 Pa 320, 84 At 392, is another case which is very much in

point with our case. Plaintiff filed a bill in equity against the defendant, the Penn Mutual Life Insurance Company of Philadelphia, praying for specific performance of a contract of life insurance in accordance with its terms, and for an accounting, and for discovery in aid of his proof. Policy issued by the defendant company to plaintiff for $25,000.00 was known as the "accumulated surplus" plan. Ten annual premiums were payable and he paid them all. It was stipulated in the policy that the accumulated surplus period would end 15 years from the issuance of the policy. At the expiration of the 15-year period, he accepted one of the options secured to him in the policy, which permitted him to withdraw the accumulated surplus apportioned to the policy and take a full paid policy for the sum of $25,000.00. The defendant company offered to pay him, as his share of the apportioned surplus, the sum of $3,347.15. The plaintiff declined to accept this amount, claiming he was entitled to the sum of $7,800.00, in accordance with an estimate which was given to him by an officer of the company when he negotiated with it for the policy. Plaintiff alleges he was induced to take the policy by reason of this estimate, and through representations made to him by the assistant secretary of the company. An estimate of $7,800.00 had in fact been made, this was admitted and the estimate was accompanied by a statement that the defendant company did not furnish inflated estimates.

The company alleged the sum offered was the full and fair share of earnings of the company during the time he held the policy and also of company's surplus and from forfeiture of other policies in his class. The Court held there was no fraud.

Two other cases of interest are *Davis v. First National Life Assurance Society, Inc., of Atlanta, Georgia*, 96 Fed Supp 393 (Dist. Court Alabama, 1951); and *Sublett v. World Insurance Company*, 224 SW2d 288 (Texas, 1949). The *Davis* case, supra, was concerned with a lottery type of insurance policy in which the Court held there was no relief available to plaintiff. The failure of the plaintiff to fully understand the type of policy and the method of paying dividends was insufficient to sustain the allegations of fraud in securing the application.

(4) A corporation is not liable in punitive damages for the wrongful act of its menial agents, in this case the salesmen, unless such act was authorized or ratified. There is no evidence in this case of authorization or ratification.

The holding of the Oregon case, *Pelton v. General Motors Acceptance Corporation*, 139 Or 198, 7 P2d 263, is that a corporation is not liable in puntive damages for the wrongful act of its menial agents, unless such act is authorized or ratified. The Trial Court in our case found as a fact that the representations made by the selling agents, Mr. Myers and Mr. Rognlie, were "material, false, and known by them to be false, and were made knowingly and willfully." Yet, there is no evidence in the case to support the finding that the representations

were made willfully by the two selling agents or that they knew the representations they were making were false. There is also no evidence in the record to show that the company authorized or ratified any such representations. On the contrary, the assistant general manager, Ray Ross, acquainted plaintiff in October, 1957, with all the facts concerning the policy. None of the representations alleged by plaintiff were authorized or ratified by the company.

Fletcher, Cyclopedia of Corporations, Permanent Edition, Volume 10, Section 4906, page 494 et seq., contains an excellent discussion concerning the award of punitive damages against a corporation. The general rule stated therein is that the acts of the servant which constitute fraud, malice, gross negligence, or oppression, must have been committed by the direction or authority of the master, or must have been ratified and adopted by the master as his own acts, or the master must have participated in the acts, or must have been guilty in the selection and employment of the servant doing the acts complained of. In shorter and more concise language, the principal must have participated in some way for it to be responsible for the acts of the agent. The ratification of the servants' acts must be clear and unequivocal.

A leading case in this field of the law is *Union Deposit Co. v. Moseley* (Texas Civ. App.), 75 SW2d 190. There is some similarity between the allegations of plaintiff in our case and the allegations in the Moseley case,

although the Moseley case is concerned with investment bonds.

In *Union Deposit Co. v. Moseley*, supra, the plaintiff, appellee, Mrs. Moseley, sued the Union Deposit Co., to cancel its investment bond issued to the appellee and to recover $480.00 paid on the bond, with interest thereon, as actual damages, and $2,000.00 as exemplary damages, alleged to have resulted from the fraud practiced upon her by appellant's agents and officers, induced her to purchase and pay the $480.00 on her bond. The jury returned actual damages and $800.00 punitive damages. Appellee alleged in testifying in substance in January, 1928, certain agents of appellant called upon and represented to her that any money paid by her on a $5,000.00 accumulative investment bond would bear 7½ per cent interest compounded annually; that she could withdraw any money she paid in at any time, then she would not have to make any payment for one year after making her first payment; and if she paid $210.00 per year for 15 years, she would have coming to her the sum of $5,000.00. She paid the agent $420.00, being $210.00 for two years. She relied upon the statements of appellant's agents and would not have paid the $420.00 but for such representation. When the bond came, she looked at it, saw that it was from appellant company, and placed it in her document box in the bank, without reading it, relying upon the statements of the agent that it contained conditions and provisions as represented by them; then she later discovered that the bond

did not contain any such provisions. About one year afterward, she received notice from appellant calling for further payment on the bond, and in reply, wrote that she did not understand that she had to make such payment. Thereafter in April, 1930, another agent of appellant called upon her and induced her to transfer her investment to another type of bond issued by appellant and by paying $60.00 additional and surrendering her old bond, she could withdraw the money she had thus paid in at any time at 7½ per cent interest compounded, and in addition, if she left the $480.00 paid in for 12½ years, she would get back $1,314.40. These statements were later confirmed by Durell, the agent, in a letter. She took Durell's letter to the head office of appellant in Denver, Colorado, in September, 1930, and S. W. Clark, its Vice-President, and E. G. Bandy, State Manager, confirmed the statements contained in Durell's letter. Upon returning home, she mailed appellant her first bond and received in a few days the one sought to be cancelled by this suit. She saw the bond was from appellant and placed it in her bank box, and without reading it, relying upon the representations of the agent and officers of appellant that it contained the conditions and provisions above mentioned. The conditions of payment were set forth in each bond, when the amounts were payable, etc. The application for the second bond and the bond contained the agreement of appellee to pay $800.00 per year for 5 years on the investment trust bond, etc. Both the application and the

bond recited that any statement of any agent in variance with the bond would not be binding upon appellant.

Quoting at page 193 of the opinion in the *Moseley* case, supra:

> "We sustain the contention of appellant that the evidence was legally insufficient to fix its liability for exemplary damages resulting from the fraudulent action of its officers or agents, which induced appellee to purchase the second bond. In both the Lane case and the Baxter case, supra, this Court held that evidence similar in all respects to that adduced herein was insufficient to fix liability of the corporation for exemplary damages resulting from the fraudulent act of its agent, under the settled rule, that 'either the act must have been previously authorized by the principal, or subsequently ratified or approved by the principal, with full knowledge of the facts.'"

Clark was Vice-President and Treasurer of the appellant, and E. G. Bandy was State Manager of the appellant at the head office. Quoting at page 193 of the opinion:

> "There was no evidence showing or tending to show that either of these officers were specifically authorized to act as the alter ego, or in place of the corporation, or was placed in complete charge of this business, and clothed with full authority to represent in respect to the fraud alleged. The mere fact that the officer is Vice-President or State Manager of sales of the corporation, does not bind the corporation for exemplary damages resulting from the fraud of such officers, unless it knowingly authorized and ratified the fraud; and it is generally held that the powers of the corporation are vested in its Board of Directors, and that the President,

Vice-President, Secretary, Treasurer, or Manager, has no authority to represent or bind the corporation except as such authority has been conferred by the Board of Directors; and that in the absence of evidence showing that such an officer was authorized to act for the corporation in practicing a fraud, or that the corporation in some manner knowingly authorized or ratified the fraud, it is not liable for exemplary damages resulting from the fraud of such officer or agent."

Oregon law is very sketchy on this point, but appellant believes the general rule is stated in the Moseley case and should be followed by this Court.

(5) Plaintiff, since his alleged discovery of the alleged fraud or misrepresentation, has by his course of conduct, affirmed his insurance contract with defendant and can no longer elect to rescind the contract.

(6) Plaintiff has not attempted to make restitution to defendant by tendering up to defendant the $100.00 dividend received and the insurance policy on his life, and therefore, plaintiff is not entitled to rescission of the insurance contract.

(7) Plaintiff, by his course of conduct, since his alleged discovery of the alleged fraud or misrepresentation, has waived any fraud or misrepresentation of defendant's salesmen in the sale of the insurance policy to plaintiff, and therefore, plaintiff not now is entitled to rescission of the insurance contract.

(8) Plaintiff has failed to act promptly in rescinding the insurance contract upon his discovery of the alleged misrepresentations of defendant's salesmen and is no longer entitled to rescind the contract.

The above four points are grouped together because they are concerned with the question of waiver of the fraud.

In October of 1957, Mr. Ray Ross, General Manager of Equitable Life & Casualty Insurance Company, and Mr. Frank Wetzel met with Dr. Lee at Dr. Lee's office in Portland, Oregon. At this time the dividends that were to be paid by the company were fully explained by Mr. Ross to Dr. Lee. Dr. Lee was told by Mr. Ross that there would be no accumulations of dividends and that the coming dividend would be ten per cent (10%) of the annual premium. This testimony was not rebutted by plaintiff, and in fact is the Court's Finding of Fact VIII. At the above described meeting, after the dividends to be paid had been explained by Mr. Ross, Dr. Lee made the following statement: "Well, I have three months to make up my mind whether to continue with the policy." This statement of Mr. Ross and Mr. Wetzel concerning the statement made by Dr. Lee was not rebutted by plaintiff.

On January 20, 1958, a One Hundred ($100.00) Dollar dividend was sent by defendant to plaintiff, together with a transmittal letter from the company stating that this dividend was 10 per cent of the annual premium. (Plaintiff's exhibit No. 7.) Shortly thereafter, the plaintiff cashed the dividend and used it to pay the next premium on the policy together with a Nine Hundred ($900.00) Dollar check of his own.

Defendant's Exhibit No. 16, a letter of January 19, 1959, from Rollin E. Bowles, Attorney for Plaintiff, to defendant, Equitable Life & Casualty Insurance Company, the closing paragraph of which is as follows:

"Upon this litigation being terminated, Dr. Lee reserves the right to then make a determination as to whether or not the cash surrender value option will be exercised or paid-up insurance will be taken."

The testimony of the case indicates that the fraud, if any, upon plaintiff by defendant's agents was discovered by plaintiff not later than October, 1957. After October, 1957, the plaintiff waited three months and took no action, then he received and retained a One Hundred ($100.00) Dollar dividend; paid the next premium on the policy after receipt of dividend; a year later he had his attorney write a letter to the company reserving his rights to act under the non-forfeiture provision of the policy after the termination of litigation.

The authorities are many and numerous that a person can waive his right to rescind a contract or to sue for fraud by not acting promptly in giving notice of rescission or by acting in such a manner as to continue on the contract and by doing affirmative acts which recognize the contract as being in full force and effect.

Defendant, in support of its contention that plaintiff has waived his right to rescind or to sue for fraud by doing the above enumerated positive acts waiving the fraud, submits the following authorities:

Massachusetts Bonding and Insurance Co. v. Anderegg et al, 83 F2d 622 (9th Circuit, 1936).

Browning v. Rodman, 268 Pa 575, 111 A 877, 111 At 877.

Farrington v. Granite State Fire Insurance Company of Portsmouth, 120 Ut 109, 232 P2d 754.

Sheppard v. Blitz, 1945, 177 Or 501, 163 P2d 519.

The *Rodman* case, supra, states the general rule at page 878 of the opinion:

> "One induced by fraud to make a contract, may on discovery of the fraud, either affirm the contract and sue for damages, or, as here done, assert them by way of a counterclaim in a direct action on the contract, or in any manner growing out of it, or he may repudiate the contract and institute an action for a rescission thereof (13 Corpus Juris, sec. 653); but if the subject of the sale or contract is open to the buyer's observation, or by reasonable inquiry its true condition might have been ascertained, he is bound to examine or inquire for himself and trust his own judgment, or insist on a warranty from the vendor (Veasey v. Soton) 3 Allen (Mass.) 380; and, in an action for deceit, based on fraud in the procurement of a contract thus affirmed, an important distinction exists with respect to acts done in affirmance of the contract after discovery of the fraud. If the defrauded party acquires knowledge of the fraud, while the contract remains executory, and thereafter does any act in performance or affirmance of the contract, or exacts performance from the other party, he thereby condones the fraud and waives his right of action."

(9) Plaintiff did not rely upon the representations of the selling agents in entering into the insurance contract with defendant.

This could be better stated by saying that Dr. Lee in this case has attempted to convert an estimate into a firm bid or guarantee. The amount of dividends to

be paid in the future could not possibly be guaranteed, and plaintiff knows this as well as anyone. As to whether the investment would be good or bad, plaintiff knew it was a speculation as indicated by the comment of the banker and insurance broker whose advice plaintiff sought. The investment in the expansion of any small, young company is always a speculation. The truth of the matter is that the so-called misrepresentations of appellant's agents may yet come true and the Doctor may wish he had continued longer with his policy. This was, of course, the Doctor's intention when he continued on the policy after being informed by Mr. Ross of the dividends expected to be paid.

CONCLUSION

Firstly, it is contended that the Trial Court had no jurisdiction over this case. Secondly, the representations as alleged were representations of future facts; estimates and prophesies of future happenings, and as such the representations cannot be a basis for actionable fraud. Thirdly, Dr. Lee was not entitled to rely upon these representations because it is only common sense and common knowledge that the earnings and dividends of a company cannot be guaranteed. There was no guartee given here, merely an estimate of what might happen in the future. Fourthly, Dr. Lee has by his actions after discovery of the so-called fraud, waived any right of action which he might have had. Fifthly, Dr. Lee is not entitled to puntive damages in this case by reason of the fact that the company has not authorized or ratified the actions alleged.

Respectfully submitted,

DONALD A. BUSS and
HOLLIE PIHL and
KENT HOLMAN and
ARTHUR NIELSON;
BUSS & PIHL,
Attorneys for Appellant.

No. 17038

United States
COURT OF APPEALS
for the Ninth Circuit

EQUITABLE LIFE AND CASUALTY INSURANCE CO.,

Appellant,

vs.

VIRGIL N. LEE,

Appellee.

BRIEF OF APPELLEE, VIRGIL N. LEE

Appeal from the United States District Court for the District of Oregon.

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EQUITABLE LIFE AND CASUALTY INSURANCE CO.,

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vs.

VIRGIL N. LEE,

Appellee.

BRIEF OF APPELLEE, VIRGIL N. LEE

Appeal from the United States District Court for the District of Oregon.

The statement of the case and the statement of facts as set forth in the brief of the appellant are not such as need any further statement or clarification on the part of the appellee.

SUMMARY OF ARGUMENT AND STATEMENT OF JURISDICTION

(1) The appellant contends that this action was brought to rescind the contract of insurance (Ex. 1).

However, the only matters in any of the pleadings that raised the issue of rescission are to be found in paragraphs 6, 7, 8, 9 (R. 15, 16) of defendant's contentions in the amended pretrial order. The complaint does not set out any matter necessary to invoke the intervention of a court of equity. The complaint and all of the contentions of the plaintiff set forth in the amended pretrial order sound in tort and a tort case can not be converted into one of rescission by the defendant though he may raise equitable defenses to a law action. The case was presented and tried as a tort action, with the equitable defenses rejected by the trial court (R. 164).

In order to invoke the aid of a court of equity it is necessary to plead and establish by proof the fact that the plaintiff *has no plain, speedy and adequate remedy at law*. No such plea was made because a remedy at law was available. Likewise, punitive damages are never asked for in an equity proceeding, and are a fundamental part of both the complaint and the pretrial order. Consequently the rescission theory of the appellant is not tenable. Likewise, its challenge to the jurisdiction of the court on that ground fails, since the amount prayed for in the complaint exceeded the jurisdictional requirements to bring the case within the purview of federal jurisdiction, and unless the court can say that there is no possibility of recovery of the amount prayed for to give the court jurisdiction, then jurisdiction in the federal court lies.

(2) The theory of the case was never changed at any time from a tort theory, and the trial was conducted on that basis.

(3) There is ample evidence to support the findings of fact and conclusions of law.

(4) Corporations under Oregon law are liable for punitive damages.

(5) Since the plaintiff was proceeding in an action at law he is not required to act with the speed demanded in a rescission under an equity theory.

(6) In an action for damages on a tort theory, the return of dividends was not required.

(7) The plaintiff in order to waive any of his rights must act with full knowledge of not only his rights but what he is waiving, and he had neither the knowledge of his rights and by his action has not waived his right to bring an action for damages.

(8) Plaintiff did not attempt to rescind and was not required to act promptly.

(9) Plaintiff relied upon the representations of the selling agent and the general agent of the defendant in entering into the insurance contract with the defendant.

ARGUMENT

(1) This action as evidenced by the pleadings, amended pretrial order and the trial of the case, was for damages suffered by the plaintiff having been induced to purchase an insurance contract through fraudulent misrepresentations of the agents of the defendant.

The case was tried on a tort theory; and under Oregon law, punitive damages are available in a proper case.

Since the amount pleaded for was in excess of the jurisdictional requirement, jurisdiction lies in the federal court as the amount in controversy exceeded the limit of $10,000.00.

The trial court rejected the defense of rescission asserted by the appellant (R. 164), and properly held that the United States District Court for the District of Oregon had jurisdiction of the parties and of the subject matter and decided the case on the theory presented by the appellee. The fact that the amount recovered in general and punitive damages by the appellee was less than the jurisdictional amount is not determinative of jurisdiction.

In the case of *Firemans Fund Ins. Co.* v. *Railway Express Agency,* 253 F.2d 780, the court says, at page 783:

> "This court also made similar rulings. In Calhoun v. Kentucky-West Virginia Gas Co., 6th Cir., 166 F. 2nd 530, we pointed out that jurisdiction must be distinguished from the merits and that unless the claim set forth in the pleading involving the necessary jurisdictional amount is plainly unsubstantial, either because obviously without merit, or because its unsoundness results so clearly from court decisions as to leave no room for the inference that the questions sought to be raised can be the subject of controversy, a case is presented within the federal jurisdiction regardless of the fact that a final judgment on the merits fails to establish the necessary jurisdictional amount."

It is true that in this case the court applied the out-of-pocket rule with respect to actual damages. Nonetheless, that ruling does not automatically convert the

case into one of rescission, nor oust the federal district court from jurisdiction.

(2) The plaintiff did not change his theory of the case at any time.

Since the appellant had raised the issue of rescission and it was still a matter for the determination of the court as to whether the court would accept the theory of the appellee or that of the appellant, it was incumbent upon the appellee to inform the court that he was prepared to return the last dividend check (Plf's Ex. 8) for $100.00. That did not change the theory of the plaintiff's case in any degree.

(3) The findings of fact and conclusions of law are supported by the evidence.

The court found that there was fraud in the sale of the policy of insurance involved (R. 136, 137, 161), and further found that there was no waiver on the part of the appellee by his course of action (R. 20, 142).

The case of *Herman* v. *Mutual Life Insurance Company of New York,* 108 F.2d 678, 127 A.L.R. 1464, was a case in which rescission was sought, as contrasted to the case at bar where damages were sought. In the Herman case the plaintiff retained his policy of insurance and accepted the benefits therefrom for a period of approximately six years, and then sought to rescind. Basically the court there held that if one seeks to rescind on the basis of fraud, he must act promptly after learning of the fraud or he is not entitled to rescind. The Herman case has no application, by reason of the

fact that rescission is not the relief sought by the appellee.

The case of *Sheppard* v. *Blitz,* 177 Or. 501, 163 P.2d 519, is ample authority that one seeking damages, as contrasted to rescission, by reason of fraud, does not need to act with the same dispatch as he would do if he were seeking to rescind.

In *Sheppard* v. *Blitz, supra,* the plaintiff instituted an action against Blitz individually and as trustee in February of 1938. In March of 1940 A. I. Blitz died and his widow, who was executrix of his estate, was substituted in his place individually. No substitution was made for A. I. Blitz as trustee. The plaintiff sought to rescind a contract previously entered into with A. I. Blitz individually and as trustee, on the ground of fraudulent misrepresentation. A decree was entered by the trial court in accordance with the prayer of the complaint. The decision of the trial court was reversed by the Supreme Court of the State of Oregon on June 9th, 1942, 168 Or. 691, 120 P.2d 509, on the ground that there was a defect of parties defendant, and returned to the trial court for further proceedings. Pursuant to an order entered by the trial court the plaintiff was permitted to amend his complaint and proceed against the estate of A. I. Blitz individually in a tort action seeking damages for fraudulent misrepresentation. Judgment was entered in the trial court in behalf of the plaintiff, and an appeal was taken by the defendant. The case was decided by the Supreme Court of Oregon November 14th, 1945, more than eight years after the

original complaint was filed, and sustained the trial court on the question of damages.

The Supreme Court of Oregon reviewed the cases bearing on the subject, and found that the plaintiff could bring his action for fraud on a tort theory even though he had previously proceeded to trial on an equity theory of rescission.

The case of *Sheppard* v. *Blitz, supra,* is authority for the fact that one does not have to act with the same dispatch where damages for fraud are sought, as he must do where rescission is the remedy.

There is no admission on the part of the appellee or any evidence in the record that he did not act with promptness upon learning all of the facts with respect to the contract he had been induced to enter into, by reason of the fraudulent misrepresentations. He affirmed his contract, as was his right to do, and sought his remedy in damages.

As the case of *Scott* v. *Walton,* 32 Or. 460, 52 P 180, sets out:

> "A party who has been induced to enter into a contract by fraud, has upon his discovery, an election of remedies. He may either affirm the contract and sue for damages, or disaffirm it, and be reinstated in the position he was before it was consummated. These remedies, however, are not concurrent, but wholly inconsistent. The adoption of one is the exclusion of the other."

The opinion continues:

> "If he desires to rescind, he must act promptly and return or offer to return which he has received under the contract. He can not retain the fruits of

> the contract awaiting future developments to determine whether it would be more profitable for his to affirm or disaffirm. Any delay on his part, and especially his remaining in possession of the property received by him under the contract, and dealing with it as his own, will be evidence of his intention to abide by the contract."

The case of *Grange* v. *Penn Mutual Life Insurance Company,* 235 Pa. 320, 321, 84 Atl. 392, 396, and the other two cases cited by appellant deal with a matter of rescission where the plaintiff in each of the cases sought relief long after learning of the fraud, and retaining the benefits of the policy involved, which is not the case here. They deal with rescission, and this case deals with damages, so are certainly not authority for the decision of this court.

Plaintiff's Exhibit 4, "You Have Been Nominated" and Plaintiff's Exhibit 5, "Hidden Ways to Wealth" are certainly vivid examples of literature distributed by the agents of the company that made possible the perpetration of fraud as was practised in this case. Plaintiff's Exhibit 5, "Hidden Ways to Wealth" was approved by the company (R. 128) according to the testimony of Mr. Raymond R. Ross, assistant general manager, superintendent of agents for Equitable Life and Casualty Insurance Co., of Salt Lake, the defendant (R. 115, 116). The testimony of Dr. Lee with respect to the statements made to him relating to dividends that the company would pay on a policy of this type, by the agents of the company including the general agent, Mr. Reklau (R. 41, 42, 43, 44, 46, 47) certainly support the court's finding that the policy of insurance in question

(Plf's Ex. 1) was sold by fraudulent misrepresentations, even if we disregard Plaintiff's Exhibit 6 which Dr. Lee testified was shown to him and discussed with him by Mr. Reklau, the general agent of the company. Dr. Lee testified (R. 50) that he relied upon the statements made by the agents, including the general agent, in the purchase. Consequently there is ample evidence to support the finding that the policy was sold and purchased by reason of the fraudulent misrepresentations of the defendant's agent and that the defendant knew of some of the material being used to perpetrate the fraud, in having approved for use Plaintiff's Exhibit 5. Nowhere does the defendant deny that they disapproved the use of any of the other material, such as Plaintiff's Exhibits 5, 6 or 7.

(4) A corporation under Oregon law is liable for punitive damages.

Subsequent to the decision in the case cited by appellant, *Pelton* v. *General Motors Acceptance Corporation,* 139 Or. 98, 7 P.2d 263, there has been another decision by the Supreme Court of Oregon relating to punitive damages assessed against a corporation, in which the whole subject of punitive damages is thoroughly discussed. In that case, *McCarthy* v. *General Electric Co. et al.,* 151 Or. 519, 49 P.2d 993, an award of punitive damages was sustained on appeal to the Supreme Court of the State of Oregon.

The attitude of the federal courts in this matter is well settled, as in the case of *General Motors Acceptance Corporation* v. *Froelich,* 273 F.2d 92, which in-

volved the repossession of an automobile. Actual damages of $150.00 and punitive damages of $2,500.00 were awarded to the plaintiff by the jury on the ground that such repossession was wrongful. In sustaining the award of punitive damages the court says, at p. 94:

> "While the evidence in the present case leaves some doubt as to the right of plaintiff to punitive damages within the principle thus established, we think the evidence did raise an issue for the jury in that regard. It is not essential in every case that an executive officer of high rank actively participate in the corporate conduct, as in Wardman-Justice. See Jackson v. General Motors Acceptance Corp., supra. A corporation such as defendant with offices in a number of cities and engaged in widespread activities, necessarily delegates authority to its agents to be used on its behalf. If these agents in the exercise of their delegated authority, acting through regular corporate channels, engage in conduct which, except for the corporate nature of their principal, makes out a case for punitive damages, the corporation is not shielded therefrom simply by the absence of explicit authorization or ratification of the particular conduct. A contrary rule would permit punitive damages against smaller concerns as in the Wardman-Justice case, but not against a large corporation whose size and ramifications make express authorization by the top executives of its working-level agents highly unlikely. The question is whether the wanton, reckless or malicious action of the agents or employees can fairly be said to be truly that of the principal."

Also, the United States Court of Appeals for the Ninth Circuit, this court, sustained an award for punitive damages in the case of *Pacific Telephone & Telegraph Co.* v. *White,* 104 F.2d 923. In reviewing a case on appeal from the U. S. District Court for the

District of Oregon, it upheld an award of $9,750.00 punitive damages by a jury against the appellant for the assault made on the appellee by one Hansley who was Chief Special Agent for the appellant. In an exhaustive opinion the court reviewed all of the cases decided by the Oregon Supreme Court concerning punitive damages assessed against corporate defendants, including *Pelton* v. *General Motors Acceptance Corp.*, 139 Or. 198, 7 P.2d 263, 9 P.2d 128, and *McCarthy v. General Electric Company,* 151 Or. 519, 49 P.2d 993. The court says at page 928:

> "It having been brought out in the testimony that Hansley was Chief Special Agent for the appellant company and not a menial servant, in the light of Lipman, Pelton and McCarthy cases, we are brought to the conclusion that the trial court correctly declined to give requested instructions III and VI and committed no error in its instructions given on the question of punitive damages."

These cases apparently hinge on the terminology 'menial servant'. Certainly Mr. Reklau was not what could be considered a menial servant, since he was a general agent, as admitted in all of the pleadings including the amended pretrial order (R. 13) and the company approved for the use of Mr. Reklau and furnished to him apparently Plaintiff's Exhibit 5, which was the foundation for the perpetration of the fraud practiced. If anything, Mr. Reklau was less a menial servant and more the alter ego of the defendant appellant, than was the case in either *Pelton* v. *General Motors, supra, McCarthy* v. *General Motors, supra,* and the *Pacific Telephone & Telegraph* case decided by this court.

The case cited by the appellant, *Union Deposit Co.* v. *Moseley* (Texas Civ. App), 75 S.W.2d 190, and the rule there applied has no application in Oregon in accordance with the finding of the Ninth Circuit as laid down in *Pacific Telephone & Telegraph Co.* v. *White, supra.*

It might also be noted at this point that Texas has laid down what is probably the most severe rule of any state with relation to the assessment of punitive damages against a corporation, and certainly is on the minority side of the courts in its views, which are not followed in this jurisdiction. There is ample precedent in both the Oregon law and the decisions of the federal court, including the Court of Appeals for the Ninth Circuit, to support the findings of the United States District Court for the District of Oregon in relation to punitive damages.

(5) Since the plaintiff was proceeding in an action at law he is not required to act with the speed demanded in a rescission under an equity theory.

(6) In an action for damages on a tort theory, the return of dividends is not required.

(7) The plaintiff in order to waive any of his rights must act with full knowledge of not only his rights but what he is waiving, and he had neither the knowledge of his rights and by his action has not waived his right to bring an action for damages.

(8) Plaintiff did not attempt to rescind and was not required to act promptly.

In responding to the above four points, which are treated together by the appellant, the appellee again stresses the fact that these four points all deal and treat with the subject of rescission, which has previously been discussed under point (1) and point (2). Rescission was not the remedy sought, nor was it the theory of the trial of the case.

The case of *Massachusetts Bonding and Insurance Co.* v. *Anderegg et al.*, 83 F.2d 622 (9th Cir., 1936), was a case in which the insurance company, appellant, after learning of the facts upon which it predicated its refusal to pay on its policy, accepted additional premiums, and the court there held that it had waived any right ot insist on the provisions of the policy, which led it to refuse to pay claims; in effect, a type of estoppel.

The case of *Browning* v. *Rodman,* 268 Pa. 575, 111 A. 877, has no application here.

Farrington v. *Granite State Fire Insurance Company of Portsmouth,* 120 Ut. 109, 232 P.2d 754, is authority for the principle that a general agent of an insurance company can waive certain known requirements with respect to fire insurance, and the court there held that the general agent had waived those requirements and the company was thus bound.

Sheppard v. *Blitz, supra,* has been discussed at length previously.

The trial court in this case discussed the matter of waiver (R. 20, 142) and properly rejected the claim of the appellant that the appellee had waived his right to

sue for damages for fraud. The trial court, in its opinion (R. 19, 20), discussed the matter of waiver at some considerable length, and that matter was before the court. It is true that the actions of the appellee were such as would have precluded his right to rescission, but his actions did not bar his right to bring an action for damages.

Selman v. *Shirley,* 1938, 161 Or. 582, 85 P.2d 384.

(9) The plaintiff did rely upon the representations of the agents of the appellant in entering into the insurance contract.

The fact that Dr. Lee made some investigation of the company to determine their financial status does not in any way controvert the fact that he relied on the statements of the agents in entering into this transaction. He so testified (R. 50). The assertion by the appellant in his brief at p. 39, that the claims of the agents as alleged by Dr. Lee may yet come true is not in any way determinative of the issues in this case. The policy of insurance was not as represented to Dr. Lee. The court held, and properly so, that the representations were fraudulent and were made wilfully.

"V

> "The representations made by the salesmen and general agent were material, false, and known by them to be false, and were made knowingly and wilfully. In making such representations the salesmen and general agent acted as agents of the company and within the scope of their employment."
> (Findings of Fact V, R. 22)

CONCLUSION

It is respectfully submitted:

First: That the United States District Court for the District of Oregon had jurisdiction over the parties and subject matter herein involved.

Second: That the representatives as alleged in plaintiff's complaint and amended pretrial order were abundantly established by the evidence presented and that actionable fraud was amply shown.

Third: That Dr. Lee waived none of his rights by any of his actions:

Fourth: The record and the evidence amply support the award of damages to the appellee.

Fifth: The award of punitive damages is justified in the light of decisions of the Oregon courts, the United States District Court for the District of Oregon and other federal courts including the United States Circuit Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Attorneys for Appellee.

No. 17038

United States
Court of Appeals
For the Ninth Circuit

EQUITABLE LIFE AND CASUALTY INSURANCE CO.
Appellant,

vs.

VIRGIL N. LEE,
Appellee.

Appellant's Reply Brief

Appeal from the United States District Court for the District of Oregon.

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No. 17038

United States
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EQUITABLE LIFE AND CASUALTY INSURANCE CO.
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Appellee.

Appellant's Reply Brief

Concerning the summary of argument and statement of jurisdiction at page 2 of Appellee's Brief, the Appellee mentions that it is necessary to plead and establish by proof the fact that plaintiff has no plain, speedy and adequate remedy at law in order to evoke the aid of a court of equity. This comment is simply not true in a case in which fraud is alleged because in such a situation, the plaintiff has an election of remedies, either to disaffirm and rescind the contract or to affirm the contract and sue in an action for damages for fraud.

Appellee miscontrues the language contained in the case of *Herman v. Mutual Life Insurance Co. of New York*, 108 F2d 678, 127 ALR 1464. The holding in the

Herman case, supra, does not concern waiver of the fraud, but rather says that there was no fraud at all in the sale of the insurance policy.

Sheppard v. Blitz, 177 Or 501, 163 P2d 519, is cited by Appellee as authority for the proposition "that one seeking damages, as contrasted to rescission, by reason of fraud, does not need to act with the same dispatch as he would do if he were seeking to rescind." This case is not an authority for that point. The action was promptly filed in that case. The case went up to the Supreme Court of the State of Oregon on one theory, was sent back because of the defect of parties defendant, was retried in the trial court on another theory and then went back up to the Supreme Court of the State of Oregon on another appeal. There certainly was no lack of diligence on the part of plaintiff in that case.

At page 7 of Appellee's brief, Appellee cites the case of *Scott v. Walton*, 32 Or 460, P 180. Quoting from the opinion as cited therein:

> "He cannot retain the fruits of the contract awaiting future developments to determine whether it would be more profitable for him to affirm or disaffirm."

This language, of course, means that there can be a waiver of a right to bring an action for damages for fraud as well as a waiver of a right to rescind. The following is a further quoted portion from *Scott v. Walton*, supra:

> "Any delay on his part, and especially his remaining in possession of the property, received by him under the contract, and dealings with it as his own,

will be evidence of his intention to abide by the contract."

Again the Appellee misses the point of *Grange v. Penn Mutual Life Insurance Company*, 235 Pa 320, 321; 84 At 392, 396. This case was cited by Appellant and voluminously briefed by Appellant to show that there was in fact no fraud in the sale of the insurance policy.

Concerning punitive damages, there are several cases cited by Appellee. *Pelton v. General Motors Acceptance Corporation*, 139 Or 198, 7 P2d 263, and *General Motors Acceptance Corporation v. Froelich*, 273 F2d 92, are both concerned with wrongful repossession of an automobile. *McCarthy v. General Electric Co., et al*, 151 Or 519, 49 P2d 993 concerned an action for conversion of some electric switches. *Pacific Telephone & Telegraph Co. v. White*, 104 F2d 923, involved a case of assault and battery by a chief special agent for Pacific Telephone & Telegraph Company. This agent was trying to get the plaintiff to confess and tell him the names of accomplices. An armed robbery had been committed upon one of defendant's cashiers. During this questioning, the chief special agent struck the plaintiff about the head and neck and rendered him unconscious, whereupon it was necessary to remove him from the jail immediately to a hospital where he remained for a long time.

None of the above cases are in any way similar to the fact situation before this Court. As this Court well knows, it is extremely difficult to generalize where punitive damages are awarded. The facts of each particular

case must be tested before punitive damages can be awarded. At page 11 of Appellee's brief, Appellee talks about Mr. Reklau not being a "menial servant". This is probably correct, but Mr. Reklau did not sell Dr. Lee the insurance policy. The policy was sold by Mr. Rognlie and Mr. Myers. Mr. Reklau did not meet Dr. Lee until after the policy was sold. The court found as a fact the plaintiff's Exhibit 6 was not shown to him prior to his purchase of his policy.

The case of *Union Deposit Co. v. Moseley*, (Texas Civil Appeals) 75 SW2d 190, is very similar to the facts alleged by Appellee in this case. In fact, *Union Deposit Co. v. Moseley*, supra, is a much stronger case than this case before the Court. In that case, representations were made by the Vice-President-Treasurer and by the State Manager of Sales for the corporation. The Court held that these representations did not bind the corporation for exemplary damages unless it knowingly authorized and ratified the fraud. In this case, the alleged representations were made by two selling agents, Mr. Myers and Mr. Rognlie. They are the agents who sold Dr. Lee the policy. It is the representations of two life insurance sales agents which are in issue here. They made predictions of future earnings and dividends. If these statements are found to be fraudulent, are they sufficient to hold the insurance company responsible by way of punitive damages as well as actual damages? At the time the estimates of future growth were made, it cannot be said that they were made maliciously or knowing that they were false.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in our main brief, we respectfully submit that the judgment of the trial court should be reversed.

Respectfully submitted,

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Attorneys for Appellant.

No. 17038

United States Court of Appeals

for the Ninth Circuit

EQUITABLE LIFE AND CASUALTY INSURANCE CO.,

Appellant.

vs.

VIRGIL N. LEE,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Oregon.

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—10-21-60

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the District of Oregon

Civil Action No. 10004

VIRGIL N. LEE,

Plaintiff,

vs.

EQUITABLE LIFE AND CASUALTY INSURANCE COMPANY,

Defendant.

COMPLAINT

Comes now the plaintiff and for cause of action against the defendant, alleges as follows:

I.

That at all times herein mentioned the plaintiff is a resident and citizen of the State of Oregon.

II.

That the defendant is a corporation existing under and by virtue of the laws of the State of Utah, and is qualified to do business in the State of Oregon.

III.

That the amount in controversy herein, exclusive of costs and interest, exceeds the sum of $3,000.00.

IV.

That at all times herein mentioned, Walter A. Reklau was the general agent for the defendant company, with offices in Portland, Oregon, and that O.

R. Myers, Jr., and Leo H. Rognile were agents for said company in the State of Oregon.

V.

That the defendant company acting through its aforesaid agents, induced the plaintiff to purchase a policy of insurance, and that said policy is dated January 20th, 1956, a copy of which is attached hereto, marked Exhibit "A", and by reference made a part hereof.

VI.

That the said defendant, through its agents, represented to the plaintiff that the policy of insurance hereinbefore referred to was in fact and effect a company ownership policy and that dividends of the company beginning with the third year of the existence of said policy would be paid upon the amount previously paid as premiums, with each annual premium being $1,000.00, and that said dividends in the past had been approximately twenty per cent or more, and that within eight years from the time that the plaintiff purchased said policy that the dividends would be more than were sufficient to pay the annual premium thereon, and when said policy was issued to the plaintiff he was again assured by the defendant company through its aforesaid agents that said dividends would be paid and that he had no cause for concern and again told the plaintiff that the dividends of the company in previous years had been in excess of twenty per cent, and likewise told the plaintiff that said dividends were calculated on the basis of the annual premiums

accumulated, and said dividends being paid the beginning of the third year on the premiums paid beginning with the first year.

VII.

That in January of 1958 the plaintiff inquired of the company defendant with respect to said dividends but was then informed that said policy provided for no such dividends and that he would not be paid in accordance with the formulae stated by the company's agents.

VIII.

That the plaintiff has paid three premiums or a total amount of $3,000.00.

IX.

That the defendant through its agents represented to the plaintiff that there would be dividends in the approximate amount of twenty per cent paid on the annual premiums of $1,000.00. That said representation was false and was material to the plaintiff. That the agents of the defendant company knew that said representations were false and intended that the plaintiff should act upon said representations and purchased said policy. That the plaintiff was ignorant of the falsity of said representations and relied upon its truth and had a right to rely thereon, and has been damaged as the result thereof in the amount of $3,000.00, with interest on $1,000.00 at the rate of 6 per cent per annum from January 20th, 1956, with interest on $1,000.00 at the rate of 6 per cent per annum from January 20th, 1957, and with

interest on $1,000.00 at the rate of 6 per cent per annum from January 20th, 1958, until paid.

X.

That said representations were wilful, deliberate and malicious and made with the intent to defraud the plaintiff, and that the plaintiff is entitled thereby to the sum of $10,000.00 as punitive damages.

Wherefore, your plaintiff prays for a judgment of this Court against the defendant, for general damages in the sum of $3,000.00, with interest on $1,000.00 at the rate of 6 per cent per annum from January 20th, 1956, with interest on $1,000.00 at the rate of 6 per cent per annum from January 20th, 1957, and with interest on $1,000.00 at the rate of 6 per cent per annum from January 20th, 1958, until paid; for punitive damages in the amount of $10,000.00, and for the plaintiff's costs and disbursements herein incurred.

/s/ ROLLIN E. BOWLES,
Of Weiser, Bowles & Young,
Attorneys for Plaintiff.

NUMBER [redacted]

FACE AMOUNT [redacted]

EXHIBIT "A"

Equitable Life and Casualty

INSURANCE COMPANY

AN OLD LINE CAPITAL STOCK LEGAL RESERVE COMPANY

(Hereinafter Called the Company)

Name of Insured	[illegible]	Issue Age	[illegible]	Date of Issue	JANUARY 20, 19[illegible]
	Annual	Semi-Annual	Quarterly	Monthly	
Total Premium:	$ 1,000.00	$ [illegible]	$ 255.00	$ 91.70	

BENEFICIARY:

FLORENCE K. LEE, WIFE

EQUITABLE LIFE AND CASUALTY INSURANCE COMPANY WILL PAY to the beneficiary the Face Amount of Insurance, together with any dividends and interest thereon at not less than 3% a year compounded annually, immediately upon receipt of due proof of the death of the Insured while this policy is in force, subject to the terms and provisions hereof.

PROFIT-SHARING

THIS POLICY SHALL PARTICIPATE IN THE PROFITS OF THE COMPANY. Such profits shall be composed of (1) Savings in Mortality, (2) Profit from Lapses, (3) Interest in Excess of Reserve requirements, and (4) Savings from Expense Loadings and in Economy of Management. Dividends are payable as provided in the paragraphs headed "DIVIDENDS" on page 2 hereof.

CONSIDERATION. This policy is issued in consideration of the application herefor and of the payment of the premiums as herein provided for 20 full years unless the premium-paying period is shortened by the applications of dividends and accumulated interest thereon.

All that is printed or written by the Company on this and the following pages hereof is made a part of this contract.

The Company has caused this policy to be signed by its President and Secretary to be effective as of the date of issue hereof.

President

Secretary.

Policy Clerk

20 PAYMENT LIFE

A Profit-Sharing Policy

Form G-1258B

GUARANTEED OPTIONS

If no premium on this policy is in default and there is no indebtedness to the Company against this policy, the Payor may, subject to the conditions hereof, surrender this policy, Additions and Dividend Accumulations, to the Company within thirty-one days after the end of the twentieth year stated, but not later, under one of the options listed below. The amount of paid up insurance purchased by the Cash Value of Paid up Insurance Purchased by Dividends then outstanding to the credit of this policy and by such amount of Life Insurance as the Dividend Accumulations then outstanding to the credit of this policy will purchase as a net single premium at the then attained age of the Insured, nearest birthday.

AT THE END OF TWELVE YEARS

Option 1 Receive a Paid Up Life Insurance Policy in the amount of $ 2,114.00
Plus the amount of paid up insurance purchased by dividends and interest thereon at not less than 3% a year compounded annually

or

AT THE END OF TWENTY YEARS

Option 2 Receive in Cash the sum of $ 1,250.00
Plus the cash value of outstanding dividends and the paid up insurance purchased by dividends and interest thereon at not less than 3% a year compounded annually

or

Option 3 Receive a Paid Up Life Insurance Policy in the amount of $ 1,074.00
Plus the amount of paid up insurance purchased by dividends and interest thereon at not less than 3% a year compounded annually

If the Payor shall fail or neglect to select any option within thirty-one days after the end of the twentieth year, Option 3 shall become automatically effective.

DIVIDENDS. Beginning at the end of the second policy year, this policy shall annually participate in the profits of the Company as determined by the Board of Directors. Such participation shall continue while this policy is in full force on a premium paying basis. Any dividends from such profits apportioned by the Board of Directors on this policy shall at any time at the option of the Payor be either (1) paid in cash; or (2) applied toward payment of premiums; or (3) applied to the purchase of non-participating paid up insurance without evidence of insurability, and payable at the same time and on the same conditions as this policy; or (4) left with the Company to accumulate at the rate of interest determined by the Board of Directors, but in no event less than three per cent compounded and credited annually; which interest may be withdrawn in cash at the end of any policy anniversary or, if not withdrawn in cash, the dividend accumulations will be paid upon the maturity or expiry of the policy. If no option is selected the dividends will be applied as provided under option (3).

Any apportionment, distribution of profits, or declaration of dividends shall be at the sole and exclusive discretion of the Board of Directors and the methods and principles employed in the determination of such apportionment, distribution of profits and declaration of dividends shall be conclusive upon all parties having or claiming any interest under this policy.

POLICY YEARS AND POLICY ANNIVERSARIES. Policy years and policy anniversaries shall be computed from the date of issue of this policy.

PAYMENT OF PREMIUMS. The annual premium shown on the first page hereof is payable on the date of issue and annually thereafter, for the period specified herein. In lieu of annual payments premiums may be paid semi-annually, quarterly, or monthly at the premium rates stated on the first page hereof, with the premium due dates determined by the interval of payment selected. All premiums are payable only at the Home Office of the Company at Salt Lake City, Utah, or to a duly authorized agent presenting an official receipt signed by the President, a Vice-President, or the Secretary of the Company, and countersigned by such agent. Except as herein expressly provided, the payment of any premium shall not maintain this policy in force beyond the date when the next succeeding premium becomes payable.

GRACE IN PAYMENT OF PREMIUMS. If any premium is not paid on or before the day it falls due, there is a default in premium payment but a grace of one month (not less than thirty days) will be allowed for the payment of every premium after the first, during which time the insurance will continue in force. If the death of the Insured shall occur during the period of grace, any overdue premium on this policy will be deducted in any settlement hereunder.

REINSTATEMENT. This policy may be reinstated at any time after default in payment of premium, if not previously surrendered, upon receipt at the Home Office of evidence of insurability satisfactory to the Company and payment of overdue premiums with interest thereon from their respective due dates at six per cent per annum payable annually. Any indebtedness to the Company which was outstanding at date of default, with interest thereon at six per cent per annum payable annually, must be paid, provided, however, that said indebtedness with interest, together with any other indebtedness hereon, if not in excess of the Loan Value as at date of reinstatement, may remain as an indebtedness subject to the loan provisions of this policy. No reinstatement shall become effective until the application therefor has been received and approved by the Company while the Insured is alive and in good health.

CONTROL OF POLICY. In the absence of some special endorsement or agreement filed with the Company creating an exception hereto, the person who made application for this policy (herein referred to as the Payor) shall be in control hereof and shall be entitled to receive every benefit, exercise every right, and enjoy every privilege conferred by this policy without the consent of any revocable beneficiary.

CHANGE OF BENEFICIARY. The Payor may at any time change the beneficiary during the continuance of this policy, unless otherwise provided herein or by endorsement hereon, by filing at the Home Office of the Company a written request accompanied by this policy for endorsement of such change, and unless so endorsed, the change will not take effect. After such endorsement all rights of the former beneficiary shall cease and the change will relate back to and take effect as of the date the Payor signed said written notice of change whether or not the Insured be living at the time of such endorsement, but without prejudice to the Company on account of any payment made by it before receipt of such written notice at the Home Office. If any beneficiary shall die before the Insured, the interest of such beneficiary shall vest in the Payor unless otherwise provided herein or by endorsement hereon. The interest of any new beneficiary shall be subject to the rights of any then existing assignee.

INCONTESTABILITY. This policy shall be incontestable after it has been in force during the lifetime of the Insured for a period of two years from its date of issue, except for non-payment of premiums, except as to additional provisions, if any, which may be attached hereto relating to benefits in the event of total and permanent disability or accidental death, and except for violation of the conditions hereof relating to aviation and to military or naval service in time of war.

SUICIDE. If the Insured hereunder shall commit suicide, while sane or insane, within two years from the date of issue hereof, the liability of the Company under this policy shall be a sum equal to the premiums paid hereon, and no more.

MISSTATEMENT OF AGE. If the age of the Insured has been misstated, any amount payable hereunder shall be such as the premiums paid would have purchased at the correct age.

WAR AND AVIATION RISK PROVISION. The liability of the Company under this policy shall be limited to the amount specified below if the death of the Insured: (1) occurs as the result of war or an act of war during the period of his military or naval service for any country at war, whether declared or undeclared, or within six months after termination of such service if the cause of death occurs or has its inception while the Insured is in such service; or (2) occurs as the result of operating or riding in or descending from any kind of aircraft except as a fare-paying passenger on a commercial airline flying on a regularly scheduled route between definitely established airports. In the event the Insured's death shall occur under any of the conditions defined above, the Company's only liability under this policy shall be a sum equal to the premiums paid hereon less any indebtedness hereon.

GRADED DEATH BENEFIT IF INSURED IS UNDER AGE 1. If the age at issue of the Insured is under three years, the death benefit payable hereunder for the first 3 policy years shall not be the face amount but shall be the amount indicated in the following table according to the policy year in which death occurs.

Age at Issue of Insured	Death Benefit per $1,000 of Face Amount If death occurs in policy year		
	1	2	3
0	$[illegible]*20*	$ 500	$ 750
1	500	750	1,000
2	750	1,000	1,000

*For age at issue 0 the Death Benefit is $100.00 per $1,000 of face amount if death occurs in the first 6 months of the policy year and is $250.00 if death occurs in the second 6 months.

NON-FORFEITURE PRIVILEGES. In event of default in payment of premium the following benefits shall apply if the premium remains unpaid and the Automatic Premium Loans provision is not applicable.

(a) AUTOMATIC PAID-UP LIFE INSURANCE. Upon expiration of the period of grace this policy will be automatically continued as a non-participating paid up life insurance, payable at the same time and under the same conditions as this policy, which the Cash Value at date of default, less the amount of any indebtedness hereon, will provide as a net single premium at the Insured's attained age nearest birthday at such date. The election of the Cash Value option will revoke the automatic application of the Paid-Up Life Insurance privilege hereunder, and in such case no deduction will be made for the value of any such Paid-Up Life Insurance for the period elapsed before such election is made. The Payor may obtain a loan on such Paid-Up Life Insurance subject to the loan provisions hereof, or may surrender such Insurance within thirty one days after any anniversary of this policy for its present value as at such anniversary less any indebtedness hereon.

(b) CASH VALUE. After premiums have been paid and the policy continued in force for the period for which the cash value is shown in the Table of Cash Values the Payor of this policy may elect within three months after default in premium payment to surrender this policy and all claims hereunder and receive its cash value at date of default less any indebtedness hereon. The Cash Value shall include any outstanding dividends, including dividend accumulations, and the present value of any outstanding paid-up insurance purchased by dividends. If this policy shall have become paid-up by completion of all premium payments, it may be surrendered within thirty-one days after any anniversary hereof for its present value as at such anniversary, less any indebtedness hereon, as

BASIS OF COMPUTATION. The Cash Value per $1,000 of face amount on any anniversary of this policy is the excess of the then present value of the future life insurance benefits guaranteed by this policy for each $1,000 of face amount, exclusive of any benefits in the event of total and permanent disability or death by accident, over the then present value of a series of annual amounts each equal to the non-forfeiture factor shown in the Table of Cash Values beginning on such anniversary and continuing on subsequent anniversaries for the remainder of the period during which premiums are payable hereunder. The values so computed are taken to the next higher dollar for each $1,000 of face amount. Such Cash Values and the Paid-Up Life Insurance net single premiums and present values are calculated on the basis of the Commissioners 1941 Standard Ordinary Mortality Table with interest at the rate of three per cent per annum. All such computations are made on the assumption that the deaths in any policy year occur at the end of that year. The Cash Values and paid-up non-forfeiture benefits hereunder are not less than the minimum values and benefits required by or pursuant to any applicable statute of the State in which this policy is delivered.

The values in the tables on pages 3 and 4 are computed on the assumption that the policy has been in force and premiums have been duly paid for the number of years stated, that there is no indebtedness to the Company, and that there is no outstanding paid-up insurance purchased by dividends, nor outstanding dividends nor dividend accumulations. If the face amount under this policy is other than $1,000, the values shown in these tables for Cash, Loan and Paid-Up Life Insurance will be applied pro rata. Any value available in event of default in a premium payment due at any time other than on the policy anniversary will be calculated with allowance for the lapse of time and the payment of fractional premiums in the policy year. An extension of these tables for years not shown will be furnished by the Company upon request.

TABLE OF CASH VALUES—Per $1,000 of Face Amount

Age at Issue	End of Policy Year																	Non-Forfeiture Factor
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	
0	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
1	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
2	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
3	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
4	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
5	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
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7	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
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9	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
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11	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
12	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
13	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
14	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
15	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
16	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
17	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
18	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
19	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
20	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
21	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
22	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
23	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
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25	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
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27	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
28	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
29	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
30	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
31	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
32	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
33	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
34	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
35	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
36	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
37	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
38	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
39	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
40	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
41	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
42	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
43	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
44	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
45	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
46	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
47	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
48	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
49	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
50	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
51	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
52	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
53	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
54	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
55	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
56	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
57	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
58	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
59	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
60	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
61	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
62	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
63	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
64	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
65	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

TABLE OF PAID-UP LIFE INSURANCE VALUES—Per 1,000 of Face Amount

Age at Issue	End of Policy Year 1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
4	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
6	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
7	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
8	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
9	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
10	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
11	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
12	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
13	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
14	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
15	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
16	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
17	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
18	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
19	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
20	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
21	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
22	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
23	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
24	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
25	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
26	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
27	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
28	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
29	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
30	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
31	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
32	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
33	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
34	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
35	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
36	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
37	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
38	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
39	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
40	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
41	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
42	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
43	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
44	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
45	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
46	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
47	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
48	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
49	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
50	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
51	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
52	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
53	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
54	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
55	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
56	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
57	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
58	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
59	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
60	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
61	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
62	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
63	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
64	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
65	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

AUTOMATIC PREMIUM LOANS. If any premium on this policy is not paid on or before the date thereof or within the period of grace, the Company will charge such premium, with interest in advance at the rate of six per cent per annum to the end of the current policy year, as a loan against the policy, provided the Cash Value is equal to or greater than the indebtedness including interest and the due and unpaid premium and provided that written request for the operation of this provision has been included in the application for this policy or filed at the Home Office of the Company before default in payment of any premium hereunder or within the grace period, and such request remains unrevoked. Such automatic premium loans will be made so long as there remains sufficient Cash Value, after deducting indebtedness, to cover the premium for one day's insurance calculated pro-rata on the monthly premium basis the amount of such monthly premium being one-twelfth of the annual premium hereon. While so kept in force, the Payor shall be entitled to all other privileges hereunder exactly as if the premium had been paid in cash. The payment of premiums may be resumed hereon at any time without medical examination while the policy is automatically in force. The indebtedness hereon will be subject to the provisions relating to repayment and forfeiture stated under Cash Loans below. This automatic premium loan privilege may be revoked at any time by written request to the Company at its Home Office.

CASH LOANS. The Company will, without the consent, signature, or participation of any revocable beneficiary, lend on proper assignment and delivery of this policy and on the sole security hereof, a sum which, with interest, shall not exceed the Cash Value as at the end of the current policy year. Any existing indebtedness on or secured by this policy, including accrued interest, together with any unpaid balance of the premium for the current policy year, will be deducted from the amount of the loan. Such loan shall be available at any time after premiums have been paid hereon and the policy continued in force for the period for which a Cash Value is first shown in the Table of Cash or Loan Values, and while this policy is in force. Interest on all loans will be at the rate of six per cent per annum payable in advance to the next policy anniversary and in advance on that date and annually thereafter. If interest is not paid when due, it shall be added to the principal and bear interest at the same rate. The whole or any part of any cash loan, automatic premium loan, or interest thereon, may be repaid at any time prior to the maturity of this policy and while no premium is in default. Failure to pay any cash loan, automatic premium loan, or interest thereon, shall not void this policy unless the total indebtedness shall equal or exceed the full amount available hereunder at the time of such failure, at which time this policy shall cease and terminate.

DEFERMENT. The Company reserves the right to defer the payment of any Cash Value or the granting of any loan, unless for the purpose of paying any premiums due the Company under any policy or policies, for a period not exceeding six months from the date application therefor is received by the Company. If the payment of the Cash Value shall be so deferred for a period of thirty days or more, interest at the rate of three per cent per annum from the date of surrender to the date of payment will be allowed on the Cash Value less any indebtedness hereon.

RESERVES. The reserve for which funds are to be held by the Company on this policy shall be computed on the basis of the Commissioners 1941 Standard Ordinary Mortality Table, with interest at the rate of 3 per cent per annum, in accordance with the Commissioners Reserve Valuation Method and on the assumption that death in any [illegible] occurs at the end of that year.

GENERAL PROVISIONS. (1) No agent is authorized to make or modify this contract or to extend the time for the payment of premium or to waive any lapse or forfeiture or any of the Company's rights or requirements. Only the President, a Vice-President, or the Secretary of the Company has power to change, modify or waive the provisions of this policy, and then only in writing. (2) Any assignment of this policy must be made and sent to the Home Office in duplicate, one copy to be retained by the Company and one copy to be returned. The Company assumes no responsibility for the validity of any assignment. (3) This policy is payable at the Home Office of the Company in Salt Lake City, Utah, and not later than twenty-four hours after receipt of due proof of death of the Insured and of the interest of the claimant. Any indebtedness to the Company hereon will be deducted in any settlement hereof. (4) This policy and the application hereof, a copy of which application is attached hereto and made a part hereof, constitute the entire contract between the parties. All statements made by the Insured or in his behalf shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall void this policy or be used in defense to a claim under it, unless it be contained in the written application.

SETTLEMENT OPTIONS

AVAILABILITY. The person having control of this policy may, by written request to the Company at its Home Office, and with the written consent of the assignees, if any, elect to have the proceeds of this policy paid either in cash or in accordance with one of the following options. The beneficiary, after the Insured's death, if no previous election is then in force, may in like manner elect one of the following options as the mode of settlement.

OPTION ONE—Installment Payments for a Fixed Period. To have the sum payable, together with interest on the unpaid balance at the effective rate of two and one-half per cent per annum, paid in equal, consecutive, periodic installments for a selected fixed period of years in accordance with Table A.

OPTION TWO—Life Income with Payments Guaranteed for a Fixed Period. To have the sum payable paid in equal, consecutive, periodic installments for a fixed period of years and so long thereafter as the payee shall live, in accordance with Table B, C, or D.

OPTION THREE—Installment Payments for a Fixed Amount. To have the sum payable, together with interest on the unpaid balance at the effective rate of two and one-half per cent per annum, paid until exhaustion in consecutive periodic installments of a selected fixed amount. The final installment shall be the balance of the proceeds and interest.

OPTION FOUR—Proceeds Left at Interest. To have the Company retain the sum payable and pay interest thereon at the rate per $1,000 of $1.66 monthly, $4.96 quarterly, $9.90 semi-annually, or $20.00 annually; provided that this option shall be available only for the payment of death or maturity claims. If specified in the election, withdrawals of $100.00 or more from the sum retained may be made on interest due dates. If the balance held under this option at any time is less than $1,000, such balance may be paid forthwith.

GENERAL PROVISIONS. Unless otherwise stipulated at election and concurred in by the Company, the first installment under Option One, Two or Three shall be payable as of the date of death, maturity, or election of cash value; and the first payment under Option Four shall be payable one interest period after death or maturity.

The effective interest rate of two and one-half per cent per annum shall be deemed to be the rate of .2060% monthly, .6182% quarterly, or 1.2423% semi-annually in computing installments for such intervals.

The Company reserves the right to make payments quarterly, semi-annually, or annually, or to reduce the number of years during which payments shall continue, or both, if necessary in order to avoid making periodic payments of less than $10.00.

If a settlement option has been elected by any other than the payee, such payee shall not have the right to assign, encumber, alienate, or commute any payment thereunder, unless such right is given in the election; nor, to the extent permitted by law, shall the payments be subject to attachment, judicial process, or the claims of creditors of such payee. In no case may a payee commute the installments under Option Two.

In case of death of a payee under any of the options, unless there are provisions to the contrary, the commuted value as of the date of death of any unpaid fixed period installments under Option One or Two on the basis of interest at the rate of two and one-half per cent per annum compounded annually, and any balance held by the Company under Option Three or Four with accrued interest to date of death shall be paid in one sum to the executors or administrators of the payee.

Each installment payment after the first under Option One, Two or Three and each interest payment under Option Four will be increased by such share of interest in excess of the rates guaranteed in these options as may be apportioned thereto by the Company.

OPTION ONE, TABLE A—EQUAL INSTALLMENTS FOR EACH $1,000 OF THE NET SUM PAYABLE

No. of Years	Monthly Payment	No. of Years	Monthly Payment	No. of Years	Monthly Payment
1	$84.38	9	$10.32	17	$6.00
2	42.66	10	9.39	18	5.73
3	28.70	11	8.64	19	5.49
4	21.80	12	8.02	20	5.27
5	17.70	13	7.49	21	5.08
6	14.98	14	7.03	22	4.90
7	12.95	15	6.64	23	4.74
8	11.47	16	6.30	24	4.60

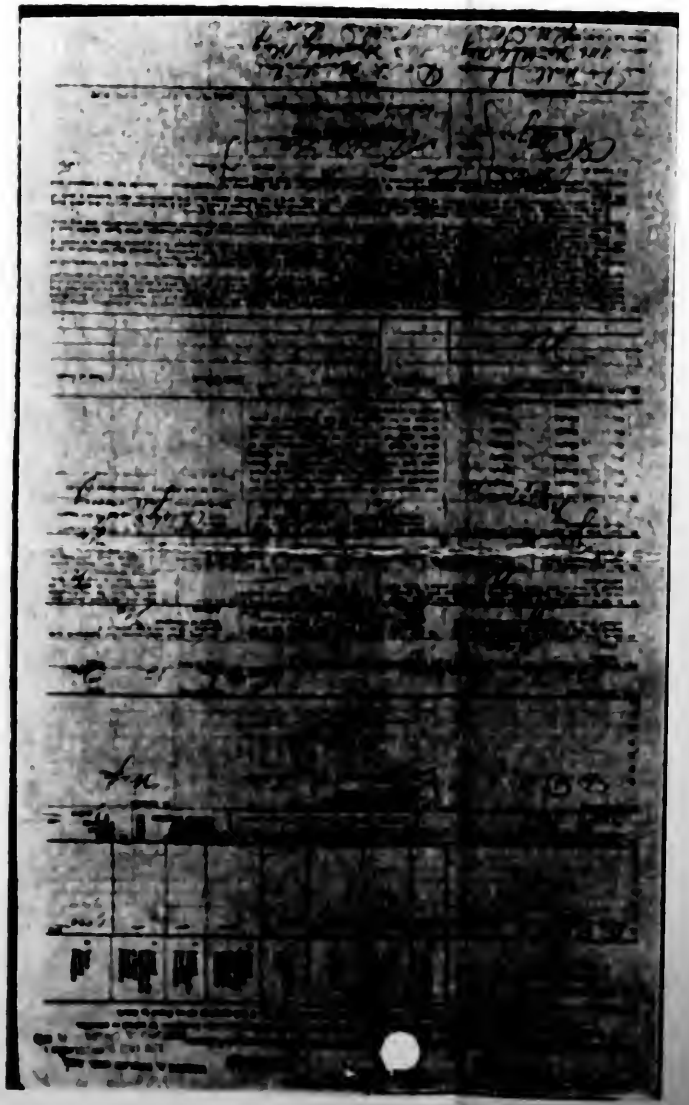
Multiply the monthly payment by 2.994 to obtain the quarterly payment, by 5.909 to obtain the semi-annual payment, and by 11.695 to obtain the annual payment.

OPTION TWO—INCOME FOR FIXED PERIOD AND LIFE THEREAFTER
Equal Installments for Each $1,000 of the Net Sum Payable

Age in Years		MONTHLY INCOME TABLE B	TABLE C	TABLE D	Age in Years		MONTHLY INCOME TABLE B	TABLE C	TABLE D	Age in Years		MONTHLY INCOME TABLE B	TABLE C	TABLE D
Male	Female	Fixed Period 10 Years	Fixed Period 15 Years	Fixed Period 20 Years	Male	Female	Fixed Period 10 Years	Fixed Period 15 Years	Fixed Period 20 Years	Male	Female	Fixed Period 20 Years	Fixed Period 10 Years	Fixed Period 20 Years
6	11	$2.64	$2.64	$2.63	51	56	$3.80	$3.78	$3.75	56	61	$5.12	$4.86	$4.53
7	12	2.66	2.65	2.65	52	57	3.84	3.82	3.79	57	62	5.23	4.94	4.59
8	13	2.67	2.67	2.66	53	58	3.89	3.86	3.83	58	63	5.36	5.03	4.64
9	14	2.69	2.68	2.68	54	59	3.93	3.91	3.87	59	64	5.48	5.12	4.70
10	15	2.71	2.70	2.70	55	60	3.98	3.95	3.91	60	65	5.61	5.21	4.75
11	16	2.73	2.72	2.71	56	61	4.03	3.99	3.95	61	66	5.74	5.30	4.80
12	17	2.74	2.74	2.73	57	62	4.08	4.04	3.99	62	67	5.87	5.39	4.85
13	18	2.76	2.76	2.75	58	63	4.14	4.09	4.04	63	68	6.01	5.48	4.90
14	19	2.78	2.78	2.77	59	64	4.20	4.15	4.08	64	69	6.16	5.58	4.94
15	20	2.81	2.80	2.79	60	65	4.26	4.21	4.14	65	70	6.30	5.65	4.98
16	21	2.83	2.82	2.81	61	66	4.32	4.27	4.20	66	71	6.45	5.73	5.02
17	22	2.85	2.84	2.84	62	67	4.38	4.32	4.24	67	72	6.60	5.80	5.05
18	23	2.86	2.87	2.86	63	68	4.45	4.38	4.29	68	73	6.76	5.90	5.09
19	24	2.90	2.89	2.88	64	69	4.52	4.45	4.34	69	74	6.91	5.97	5.13
20	25	2.93	2.92	2.91	65	70	4.59	4.51	4.39	70	75	7.07	6.05	5.14
21	26	2.95	2.95	2.93	66	71	4.67	4.58	4.45	71	76	7.23	6.13	5.17
22	27	2.98	2.97	2.96	67	72	4.75	4.65	4.51	72	77	7.38	6.18	5.19
23	28	3.01	3.00	2.99	68	73	4.83	4.72	4.57	73	78	7.54	6.24	5.20
24	29	3.04	3.03	3.02	69	74	4.93	4.80	4.63	74	79	7.69	6.30	5.22
25	30	3.08	3.07	3.05	70	75	4.99	4.87	4.68	75	80	7.84	6.35	5.23
26	31	3.11	3.10	3.08	71	76	5.09	4.94	4.74	76	81	7.96	6.39	5.24
27	32	3.14	3.13	3.11	72	77	5.19	5.02	4.80	77	82	8.13	6.43	5.25
28	33	3.18	3.17	3.15	73	78	5.29	5.09	4.86	78	83	8.26	6.47	5.26
29	34	3.22	3.20	3.18	74	79	5.40	5.17	4.91	79	84	8.39	6.50	5.26
30	35	3.26	3.24	3.22	75	80	5.51	5.24	4.97	80	85	8.51	6.52	5.26

The ages in years given for male or female is the age at last birthday of the payee when payments begin. Ages "80" and "85", each following an asterisk (*) include all ages above 80 and 85 years respectively.

Multiply the monthly payment by 2.988 to obtain the quarterly payment, by 5.944 to obtain the semi-annual payment, and by 11.795 to obtain the annual payment.



[Title of District Court and Cause.]

SUMMONS

To the above named Defendant:

You are hereby summoned and required to appear and defend this action and to serve upon Rollin E. Bowles; Weiser, Bowles & Young, plaintiff's attorneys, whose address is 706 Weatherly Building, Portland 14, Oregon, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: September 29, 1958.

[Seal] R. DeMOTT,
Clerk,

By /s/ M. CASEY,
Deputy Clerk.

Return on service of writ attached.

[Endorsed]: Filed October 3, 1958.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant and for an answer to the plaintiff's Complaint, admits, denies and alleges as follows:

I.

Admits allegations contained in Paragraphs I and II of plaintiff's Complaint.

II.

Denies generally each and every other allegation, statement and thing contained in plaintiff's Complaint.

Wherefore, having fully answered plaintiff's Complaint demands judgment that plaintiff take nothing by reason thereof and that this case be dismissed.

/s/ DONALD A. BUSS,
Of Attorneys for Defendant;

/s/ HOLLIE PIHL,
Of Attorneys for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed October 17, 1958.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

The following Pre-Trial Order was regularly heard and formulated at pre-trial proceedings, before the undersigned Judge. Plaintiff appearing by Rollin E. Bowles, his attorney, and Defendant appearing by Buss & Pihl, Donald A. Buss and Hollie Pihl, its attorneys.

Nature of Cause

This is a civil action for the recovery of money.

Agreed Facts

The parties hereto agree upon the following facts, and no proof shall be necessary as to the same at the time of trial:

1. That the Plaintiff is a citizen of the State of Oregon.

2. That the Defendant is a corporation organized and existing under and by virtue of the laws of the State of Utah, and is qualified to do business in the State of Oregon.

3. That the matter in controversy, exclusive of interest and costs, exceeds the amount of $3,000.00.

4. That the Court has jurisdiction over the parties and the subject matter.

5. That Walter A. Reklau at all times herein pertinent was the general agent of the Defendant insurance company; and that Osborne Myers, Jr., and Leo H. Ragnile were agents and employees of the said company, working under the supervision of the general agent, Walter A. Reklau.

6. That the Defendant issued to the Plaintiff a policy of insurance and that the Plaintiff has paid a total of $3,000.00 in premiums thereon since its issuance.

7. That the Defendant company paid to the Plaintiff the sum of $100.00 as a dividend on January 20, 1958, under the insurance policy herein mentioned.

Plaintiff's Contentions

Plaintiff contends:

1. That the Defendant insurance company acting by and through its general agent, Walter A. Reklau,

and sales agents, Osborne Myers, Jr., and Leo H. Ragnile, fraudulently, willfully and deliberately misrepresented the nature of said policy of insurance to the Plaintiff.

2. That said representations on the part of the agents of the Defendant company were false and were material to the Plaintiff and that the agents knew that the said representations were false and intended that the Plaintiff should act upon the representations and purchase said policy. That the Plaintiff was ignorant of the falsity of said representations and relied upon their truth and had a right to rely thereon.

3. That the Defendant company knew, or in the exercise of reasonable diligence, should have known, of the false and fraudulent misrepresentations made by their said agents in the sale of said insurance policy; and Plaintiff has been damaged in the amount of $3,000.00, with interest at the rate of six per cent per annum on $1,000.00 from January 20, 1956, until paid, with interest at the rate of six per cent per annum on $1,000.00 from January 20, 1957, until paid, and with interest on $1,000.00 from January 20, 1958, until paid.

4. That the representations aforesaid on the part of the agents of the Defendant company were willful, deliberate and malicious, and Plaintiff is entitled to punitive damages in the amount of $10,000.00.

Defendant's Contentions

Defendant contends:

5. The Defendant denies the contentions made by the Plaintiff.

Plaintiff's Exhibits

1. Insurance policy hereinabove referred to.
2. Deposition of Leo H. Ragnile.
3. Deposition of Osborne Myers, Jr.

Defendant's Exhibits

15. Deposition of Virgil N. Lee, Plaintiff.

Issues

1. Did the Defendant by and through its agents, make the representations as contended by the Plaintiff?

2. Were the representations, if any, fraudulently, wilfully, and deliberately made to Plaintiff?

3. Were the representations, if any, material representations?

4. Were the representations, if any, made with the knowledge that such representations, if any, were false or that they were made recklessly and with a disregard as to their truth or falsity?

5. Were the representations, if any, made for the purpose of deceiving the Plaintiff and for the purpose of inducing the Plaintiff to act upon them?

6. Was the Plaintiff ignorant of the falsity, if any, of the representations, if any?

7. Did the Plaintiff actually rely on the repre-

sentations, if any, and if the Plaintiff did so rely, was the Plaintiff entitled to rely on such representations, if any?

8. Did the Plaintiff suffer any damages as a direct result of the representations, if any?

9. Is the Plaintiff entitled to punitive damages under all the facts and circumstances in this case?

10. If the Plaintiff is entitled to recover, what are his general damages?

11. If the Plaintiff is entitled to recover, what are his punitive damages?

Now Therefore, it is hereby

Ordered, that the foregoing Pre-Trial Order having been agreed upon between the Court and counsel, shall supersede the pleadings, which are hereby amended to conform hereto. This order shall control the subsequent course of proceedings herein and shall not be amended at the trial except by consent or to prevent manifest injustice.

Entered at Portland, Oregon, this 12th day of April, 1959.

/s/ GUS J. SOLOMON,
Judge.

Approved:

/s/ ROLLIN E. BOWLES,
Of Attorneys for Plaintiff,

/s/ HOLLIS PIHL,
Attorney for Defendant.

Lodged: February 16, 1959.

[Endorsed]: Filed April 12, 1959.

[Title of District Court and Cause.]

AMENDED PRE-TRIAL ORDER

The following Pre-Trial Order was regularly heard and formulated at pre-trial proceedings, before the undersigned Judge, Plaintiff appearing by Rollin E. Bowles, his attorney, and Defendant appearing by Buss & Pihl, Donald A. Buss and Hollie Pihl, its attorneys.

Nature of Cause

This is a civil action for the recovery of money.

Agreed Facts

The parties hereto agree upon the following facts, and no proof shall be necessary as to the same at the time of trial:

1. That the Plaintiff is a citizen of the State of Oregon.

2. That the Defendant is a corporation organized and existing under and by virtue of the laws of the State of Utah, and is qualified to do business in the State of Oregon.

3. That the matter in controversy, exclusive of interest and costs, exceeds the amount of $10,000.00.

4. That the Court has jurisdiction over the parties and the subject matter.

5. That Walter A. Reklau at all times herein pertinent was the general agent of the Defendant

insurance company; and that Osborne Myers, Jr., and Leo H. Rognlie were agents and employees of the said company, working under the supervision of the general agent, Walter A. Reklau.

6. That the Defendant issued to the Plaintiff a policy of insurance and that the Plaintiff has paid a total of $3,000.00 in premiums thereon since its issuance.

7. That the Defendant company paid to the Plaintiff the sum of $100.00 as a dividend on January 20, 1958, under the insurance policy herein mentioned.

Plaintiff's Contentions

Plaintiff contends:

1. That the Defendant insurance company acting by and through its general agent, Walter A. Reklau, and sales agents, Osborne Myers, Jr., and Leo H. Rognlie, fraudulently, willfully and deliberately misrepresented the nature of said policy of insurance to the Plaintiff.

2. That said representations on the part of the agents of the Defendant company were false and were material to the Plaintiff and that the agents knew that the said representations were false and intended that the Plaintiff should act upon the representations and purchase said policy. That the Plaintiff was ignorant of the falsity of said representations and relied upon their truth and had a right to rely thereon.

3. That the Defendant company knew, or in the exercise of reasonable diligence, should have known, of the false and fraudulent misrepresentations made by their said agents in the sale of said insurance policy; and Plaintiff has been damaged in the amount of $3,000.00, with interest at the rate of six per cent per annum on $1,000.00 from January 20, 1956, until paid, with interest at the rate of six per cent per annum on $1,000.00 from January 20, 1957, until paid, and with interest on $1,000.00 from January 20, 1958, until paid.

4. That the representations aforesaid on the part of the agents of the Defendant company were willful, deliberate and malicious, and Plaintiff is entitled to punitive damages in the amount of $10,000.00.

Defendant's Contentions

Defendant contends:

5. The Defendant denies the contentions made by the Plaintiff.

6. That the Plaintiff, since his alleged discovery of the alleged fraud or misrepresentations, has by his course of conduct affirmed his insurance contract with Defendant and cannot now elect to rescind the insurance contract.

7. That the Plaintiff has not attempted to make restitution to Defendant by tendering up to Defendant the $100.00 dividend received and the insurance policy on his life, and therefore Plaintiff is not entitled to rescission of the insurance contract.

8. That the Plaintiff, by his course of conduct, since his alleged discovery of the alleged fraud or misrepresentations, has waived any alleged fraud or misrepresentations of Defendant's agents in the sale of the insurance policy to Plaintiff, and therefore Plaintiff is not entitled to rescission of the insurance contract.

9. That the Plaintiff has failed to act promptly in rescinding the insurance contract upon his alleged discovery of the alleged misrepresentations of Defendant's agents and is not now entitled to rescind the contract.

Plaintiff denies Defendant's contentions.

Plaintiff's Exhibits

1. Insurance policy hereinabove referred to.
2. Deposition of Leo H. Rognlie.
3. Deposition of Osborne Myers, Jr.

Defendant's Exhibits

15. Deposition of Virgil N. Lee, Plaintiff.

16. Letter of Rollin Bowles to Equitable Life and Casualty Insurance Company dated January 19, 1959.

17. Letter from Lewis R. Rich to Virgil N. Lee dated January 20, 1958.

Issues

1. Did the Defendant by and through its agents, make the representations as contended by the Plaintiff?

2. Were the representations, if any, fraudulently, willfully, and deliberately made to Plaintiff?

3. Were the representations, if any, material representations?

4. Were the representations, if any, made with the knowledge that such representations, if any, were false or that they were made recklessly and with a disregard as to their truth or falsity.

5. Were the representations, if any, relied upon made for the purpose of deceiving the Plaintiff and for the purpose of inducing the Plaintiff to act upon them?

6. Was the Plaintiff ignorant of the falsity, if any, of the representations, if any?

7. Did the Plaintiff actually rely on the representations, if any, and if the Plaintiff did so rely, was the Plaintiff entitled to rely on such representations, if any?

8. Did the Plaintiff suffer any damages as a direct result of the representations, if any?

9. Is the Plaintiff entitled to punitive damages under all the facts and circumstances in this case?

10. If the Plaintiff is entitled to recover, what are his general damages?

11. If the Plaintiff is entitled to recover, what are his punitive damages?

12. Has the Plaintiff, since his alleged discovery of the alleged fraud or misrepresentations, by his course of conduct affirmed his insurance contract

with Defendant, and if so, is he entitled to now rescind the contract?

13. Has the Plaintiff failed to make restitution to Defendant by tendering up to Defendant the $100.00 dividend received and the insurance policy on his life, and if so, is he entitled to now rescind the insurance contract?

14. Has the Plaintiff, by his course of conduct since his alleged discovery of the alleged fraud or misrepresentations, waived any alleged fraud or misrepresentations of Defendant's agents in the sale of the insurance policy to Plaintiff, and if so, is Plaintiff entitled to now rescind the insurance contract?

15. Has Plaintiff failed to act promptly in rescinding the insurance contract upon his alleged discovery of the alleged misrepresentations of Defendant's agents, and if so, is Plaintiff now entitled to rescind the contract?

Now, Therefore, it is hereby

Ordered, that the foregoing Pre-Trial Order having been agreed upon between Court and counsel, shall supersede the pleadings, which are hereby amended to conform hereto. This order shall control the subsequent course of proceedings herein and shall not be amended at the trial except by consent or to prevent manifest injustice.

Entered at Portland, Oregon, this 13th day of April, 1959.

/s/ GUS J. SOLOMON,
Judge.

Approved:

/s/ ROLLIN E. BOWLES,
Of Attorneys for Plaintiff;

/s/ HOLLIE PIHL,
Of Attorneys for Defendant.

[Endorsed]: Filed April 13, 1959.

[Title of District Court and Cause.]

OPINION

Sept. 23, 1959

Solomon, Judge:

Dr. Virgil Lee, the plaintiff, brought this action in fraud against Equitable Life and Casualty Insurance Company to recover damages occasioned by defendant's misrepresentations.

In January, 1956, plaintiff purchased a twenty-payment life insurance policy from defendant, upon which three annual premiums of $1,000 each had been paid prior to the commencement of this action. At the conclusion of trial, I found that the purchase of this policy had been induced by defendant's fraud in falsely representing that dividends on this type of policy had in the past averaged approximately 20 per cent per annum on the total premiums paid. In October, 1957, defendant informed plaintiff that it intended to pay a 10 per cent dividend on the annual premium only. In January, 1958, it paid plaintiff a dividend of $100.

This matter is now before the court on defendant's claim that plaintiff waived his right to rescind the contract by retaining the dividend and by failing to give timely notice of his intention to rescind. Defendant asserts that plantiff is therefore precluded from maintaining this action.

Defendant misconstrues plaintiff's complaint. This is an action for damages, not rescission. Plaintiff affirmed the contract and waived his right to rescind. By this affirmance, he did not waive his right to recover damages. Selman vs. Shirley, 1938, 161 Or. 582, 85 P.2d 384; Sheppard vs. Blitz, 1945, 177 Or. 501, 163 P.2d 519.

The question left to be determined is the proper measure of damages. Counsel are invited to submit briefs on whether the "out of pocket rule" or the "benefit of the bargain rule" is properly applicable to the present action.

Plaintiff shall have 10 days to submit authorities and defendant shall have an equal time thereafter to answer.

[Endorsed]: Filed September 23, 1959.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on regularly for trial before the Honorable Gus J. Solomon, Judge of the above-

entitled Court; plaintiff appearing in person and by Rollin E. Bowles, of Weiser, Bowles & Young, and defendant appearing by Hollie Pihl and H. Kent Holman of Buss & Pihl. A pre-trial order approved by the parties was signed by the Court and entered.

The Court heard the evidence, found in favor of plaintiff, and in accordance therewith makes the following

Findings of Fact

I.

Plaintiff is a resident and citizen of the State of Oregon, and the defendant is a corporation existing under the laws of the State of Utah.

II.

The matter in controversy exceeds the sum of $10,000.00.

III.

At all pertinent times, O. R. Myers, Jr., and Leo H. Rognile were salesmen employed by the defendant, and Walter A. Reklau was the general agent of the defendant in the area of Multnomah County, Oregon.

IV.

On or about January 20, 1956, the defendant through Myers, Rognile and Reklau, to induce plaintiff to purchase an insurance policy, falsely represented that the policy was an investment which would pay dividends at the rate of twenty per cent per year, beginning at the end of the second year of the policy; the first dividend to be paid on the third

anniversary of the issuance of the policy, and dividends equal to twenty per cent of the accumulated premiums would thereafter be paid each year. They further represented that the company had paid these returns in prior years and that other companies with similar programs have paid returns equally as great if not greater.

V.

The representations made by the salesmen and general agent were material, false, and known by them to be false, and were made knowingly and willfully. In making such representations the salesmen and general agent acted as agents of the company and within the scope of their employment.

VI.

Relying upon these representations, plaintiff did purchase a twenty payment life participating policy, Number 110320, with a face insurance value of $16.033.00 and with annual premiums of $1,000.00.

VII.

Plaintiff made an immediate payment of $1,000.00 and subsequently paid two additional annual premiums of $1,000.00 each.

VIII.

In October, 1957, Mr. Ross, assistant to the general manager of the defendant company, informed plaintiff that the defendant did not intend to pay dividends in accordance with the representations of its agents. The plaintiff then learned for the first

time that the representations of the salesmen and the general manager had been false.

IX.

In January, 1958, and in January, 1959, the defendant paid dividends of $100.00, which dividends were equal to ten per cent of the annual premium.

X.

Within two years from the discovery of the fraud, plaintiff affirmed the contract and filed this action for damages.

XI.

Plaintiff suffered general damages in the sum of $3,000.00 and, by reason of the wilfulness of the misrepresentations, plaintiff is entitled to punitive damages in the sum of $2,000.00.

Conclusions of Law

I.

This Court has jurisdiction of this cause.

II.

Plaintiff's action for damages, based upon his affirmance of the contract, was timely brought.

III.

Plaintiff is entitled to the sum of $3,000.00 as general damages, the further sum of $2,000.00 as punitive damages, and for plaintiff's costs and disbursements.

Dated this 11th day of May, 1960.

/s/ GUS J. SOLOMON,
United States District Judge.

[Endorsed]: Filed May 12, 1960.

In the United States District Court
for the District of Oregon

Civil No. 10004

VIRGIL N. LEE,

Plaintiff,

vs.

EQUITABLE LIFE AND CASUALTY INSURANCE COMPANY,

Defendant.

JUDGMENT ORDER

Based upon Findings of Fact and Conclusions of Law heretofore entered,

It is Ordered and Adjudged that plaintiff recover from the defendant the sum of $3,000.00 as general damages, together with $2,000.00 as punitive damages, and for costs and disbursements taxed at $45.10.

Dated this 11th day of May, 1960.

/s/ GUS J. SOLOMON,
United States District Judge.

[Endorsed]: Filed May 12, 1960.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The Plaintiff, Virgil N. Lee, and Rollin Bowles, Weiser and Bowles, his attorneys.

Notice is hereby given that the Defendant hereby appeals to the United States Court of Appeals for the Ninth Circuit from final judgment entered in this action in favor of the Plaintiff and against the Defendant, which judgment is dated May 11, 1960, and was entered May 12, 1960.

Dated this 8th day of June, 1960, at Portland, Oregon.

/s/ H. KENT HOLMAN,

Of Attorneys for Defendant, Buss & Pihl, H. Kent Holman.

Service of copy acknowledged.

[Endorsed]: Filed June 8, 1960.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men by These Presents, that we, Equitable Life and Casualty Insurance Company, a corporation, Principal, and United States Fidelity and Guaranty Company, a Maryland corporation, duly licensed to do a surety company business in

the State of Oregon, Surety, are held and firmly bound unto Virgil N. Lee in the sum of $6,000.00 to be paid to the said Virgil N. Lee, his attorneys, successors, executors, administrators and assigns, to which payment to be well and truly paid, we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 9th day of June, 1960.

Whereas, on May 11, 1960, a Judgment was rendered in the above-entitled action in favor of the above-named obligee, and the said Equitable Life and Casualty Insurance Company has duly filed a Notice of Appeal from said Judgment to the United States Court of Appeals for the Ninth Circuit; and

Whereas, the said Equitable Life and Casualty Insurance Company desires a stay of all proceedings in the above-entitled cause until determination of said appeal;

Now, therefore, the condition of this bond is such that if the said Equitable Life and Casualty Insurance Company, as appellant, shall prosecute its appeal with effect and shall satisfy the said Judgment in full together with costs, interest and damages for said delay if said appeal is dismissed or if the judgment is affirmed, and shall satisfy in full such modification of the Judgment and costs, interest and damages as may be adjudged and awarded by

the said Court of Appeals, then this obligation to be void, otherwise to remain in full force and effect.

[Seal] EQUITABLE LIFE AND CASUALTY INSURANCE COMPANY,

By /s/ LEWIS R. RICH,
Secretary;

[Seal] THE UNITED STATES FIDELITY AND GUARANTY COMPANY,

By /s/ JOHN L. RIESCHEL,
Attorney-in-Fact.

Countersigned at Portland, Oregon, this 10th day of June, 1960.

By /s/ EDWARD C. STIPE,
Resident Agent.

The amount of the foregoing bond is hereby approved at Portland, Oregon, this 13th day of June, 1960.

/s/ ROLLIN E. BOWLES,
Of Attorneys for Appellee.

The foregoing bond is hereby approved this 13th day of June, 1960, to stand as a supersedeas until the final determination of the appeal.

/s/ WILLIAM G. EAST,
United States District Judge.

Service of copy acknowledged.

[Endorsed]: Filed June 13, 1960.

[Title of District Court and Cause.]

STATEMENTS OF POINTS TO BE RELIED UPON

(1) This action brought by the Plaintiff is a recission action for the recovery of premiums paid on a life insurance policy, all as evidenced by the Pleadings, Pre-trial Order and Proceedings had during the trial of the case. Plaintiff is not entitled to obtain punitive damages in addition to a rescission of the insurance contract. The amount in controversy under the rescission action is $3,000.00, therefore the federal courts lack jurisdiction in this case because the amount in controversy is less than $10,000.00.

(2) Plaintiff is not entitled to change the theory of his case from rescission to an action for damages for fraud after the pleadings are complete, Pre-trial Order has been entered and trial of the case has been had.

(3) The Findings of Fact and Conclusions of Law are not supported by the evidence.

(4) A corporation is not liable in punitive damages for the wrongful act of its menial agents, in this case the salesmen, unless such act was authorized or ratified. There is no evidence in this case of authorization or ratification.

(5) Plaintiff, since his alleged discovery of the alleged fraud or misrepresentation, has by his course of conduct affirmed his insurance contract with De-

fendant and can no longer elect to rescind the contract.

(6) Plaintiff has not attempted to make restitution to Defendant by tendering up to Defendant the $100.00 dividend received and the insurance policy on his life, and therefore Plaintiff is not entitled to rescission of the insurance contract.

(7) Plaintiff, by his course of conduct, since his alleged discovery of the alleged fraud or misrepresensation, has waived any fraud or misrepresentation of Defendant's salesmen in the sale of the insurance policy to Plaintiff, and therefore Plaintiff not now entitled to rescission of the insurance contract.

(8) Plaintiff has failed to act promptly in rescinding the insurance contract upon his discovery of the alleged misrepresentations of Defendant's salesmen and is no longer entitled to rescind the contract.

(9) Plaintiff did not rely upon the representations of the selling agents in entering into the insurance contract with Defendant.

/s/ H. KENT HOLMAN,

Of Attorneys for Defendant; Donald A. Buss, Hollie Pihl, H. Kent Holman and Arthur Nielson, Buss & Pihl.

Affidavit of service by mail attached.

[Endorsed]: Filed July 7, 1960.

[Title of District Court and Cause.]

ORDER

Defendant-Appellant having moved by its attorneys to forward all of the exhibits in the above-entitled case;

It Is Hereby Ordered that all of the exhibits in the above-entitled case be forwarded to the Ninth Circuit Court of Appeals in San Francisco, California.

Dated this 8th day of July, 1960.

/s/ JOHN F. KILKENNY,
Judge

[Endorsed]: Filed July 8, 1960.

[Title of District Court and Cause.]

ORDER

Based upon the Motion presented by one of Defendant's attorneys, H. Kent Holman, for 15 days' extension of time,

It Is Hereby Ordered that the Defendant shall have 15 days from this date in order to perfect its Appeal in the above-entitled case.

Dated this 12th day of July, 1960.

/s/ JOHN F. KILKENNY,
Judge.

[Endorsed]: Filed July 12, 1960.

United States District Court
District of Oregon

Civil No. 10004

VIRGIL N. LEE,

Plaintiff,

vs.

EQUITABLE LIFE AND CASUALTY INSURANCE COMPANY,

Defendant.

Before: Honorable Gus J. Solomon,
District Judge.

TRANSCRIPT OF PROCEEDINGS

April 13, 1959—1:30 P.M.

Appearances:

MR. ROLLIN E. BOWLES,
Of Attorneys for Plaintiff.

MESSRS. HOLLIE PIHL and
KENT HOLMAN,
Of Attorneys for Defendant.

The Court: I have read the pretrial order and the amended pretrial order. Is there anything else you want to say, Mr. Bowles?

Mr. Bowles: Thank you, your Honor. I don't think there is anything else that I need to say at this juncture.

The Court: Do you want to say something, Mr. Pihl?

Mr. Pihl: No, your Honor.

The Court: Call your first witness.

VIRGIL N. LEE

the Plaintiff herein, was produced as a witness in his own behalf, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bowles:

The Court: I have read his deposition, which indicates that he is a dentist, and he lives at 822 Northeast Broadway and he has practiced dentistry in Oregon for about fifteen years; that he has his offices in the Weatherly Building, and that he is the plaintiff in this case. So you won't have to go into that.

Mr. Bowles: Very good, your Honor. [2*]

Q. Dr. Lee, were you ever contacted by a representative of the Equitable Life and Casualty Company with respect to their program of insurance? A. Yes, sir.

Q. Who was the first person that you recollect contacted you? A. Mr. Leo Rognlie.

Q. Approximately what time or what year?

A. I believe that was 1955 in the late summer.

Q. Was there more than one contact during that area of time? A. Yes, sir.

Q. Did anyone other than Mr. Rognlie ever contact you?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Virgil N. Lee.)

A. Would you repeat that, sir? I don't think I quite got it.

Q. Were there other persons than Mr. Rognlie who contacted you? A. Yes.

Q. Who were they?

A. Mr. O. R. Myers and Mr. Reklau.

Q. Will you tell us what the substance of their contacts was?

A. To begin with, a health and accident policy was proposed to me, brought to my attention, by Mr. Rognlie. I wasn't interested in health and accident insurance, being fully protected. Then the question was brought up of insurance profit-sharing in nature. That was discussed at considerable length.

The Court: Tell us what they said and what you said.

A. Sir? [3]

The Court: What did they say? What did Mr. Rognlie say about a profit-sharing contract?

A. That the company was issuing such a policy and that it had features in it of sharing in the profits of the company.

The Court: Was it an insurance policy?

A. There was an insurance policy associated with it, sir.

The Court: What size insurance policy was it?

A. $16,000, 20-pay-life.

The Court: $16,000, 20-pay-life?

A. Yes, sir.

(Testimony of Virgil N. Lee.)

The Court: You would pay $1,000 a year?

A. Yes, sir.

The Court: And what would you get in addition to the $16,000 in life insurance?

A. A share of the earnings of the company in all the states in which the company did business in excess of the regular dividends, and its earning capacity was much greater than that.

The Court: What do you mean, its earning capacity was much greater than that?

A. There were many ways in which an insurance company could earn money; that a policy properly handled, a profit-sharing policy, had five, I believe, different ways in which it would earn dividends over and above what an ordinary insurance policy might enjoy.

The Court: Did they tell you that you were going to get [4] profits that other policyholders were not going to get?

A. Yes, sir.

The Court: And you would have a 20-pay-life?

A. Yes, sir.

The Court: Were you told that other people who bought a 20-pay-life policy would not get as much as you would if they didn't pay that little additional amount?

A. Not unless it was a profit-sharing policy, sir.

The Court: A profit-sharing policy, in your opinion, was one in which you would get what?

A. The dividends were cumulative by $1,000 per

(Testimony of Virgil N. Lee.)

year. This policy was one unit consisting of 16 shares.

The Court: 16 shares of what?

A. Each share coming into the annual working capital as the $1,000 was paid to the extent of 16 shares.

The Court: Were you buying stock in the company?

A. As such, no, but as it was described to me, at the end of a certain number of years, preferably five years, there would undoubtedly be stock splits. This was explained to me.

The Court: Stock splits?

A. Yes, sir; and that we would then be as this book, Hidden Ways to Wealth, indicates what companies had done in previous times.

The Court: In stock companies, you mean?

A. Yes, sir. [5]

Mr. Bowles: If I might interrupt the Court, I would suggest that we have an exhibit at this point, this circular, Hidden Ways to Wealth.

Mr. Pihl: No objection, your Honor.

Mr. Bowles: It has been marked as Plaintiff's Exhibit 5.

The Court: Admitted.

(The pamphlet referred to, entitled "Hidden Ways to Wealth," was received in evidence as Plaintiff's Exhibit 5.)

The Court: Did they show you the policy of insurance when they were talking to you?

(Testimony of Virgil N. Lee.)

A. No, sir.

The Court: They just gave you that book?

A. This book was left with me primarily by Mr. Myers, one of the agents of the company. If I might explain to the Court, I wasn't interested in insurance, and I told them so. I didn't want insurance, but in order to enjoy—I wanted income. Through this, as explained in this book, Hidden Ways to Wealth, what other companies had done, we had the opportunity to invest in this and get all these dividends, which would bring our policy up to many times its original face value by the end of twenty years, and at the end of five to seven years it would be self-supporting.

The Court: You mean after five to seven years you would earn so much you wouldn't have to pay any more premiums? [6]

A. That is right, sir; no more premiums.

The Court: Before you go any further, let me find out from the defendant what your position is on this.

Mr. Pihl: Your Honor, our position is that all the statements made by the defendant's agents were in the matter of speculation as to future dividends passed.

The Court: What kind of a policy did he get?

Mr. Pihl: A 20 Payment Life, your Honor, with a $16,074 face value.

The Court: Would he pay a thousand dollars a year for it?

Mr. Pihl: At his age he would pay a thousand

(Testimony of Virgil N. Lee.)

dollars a year for it, your Honor. I believe his age at that time was 52, if I am not mistaken.

The Court: If he paid a thousand dollars a year for 20 years he would get $16,000 back?

Mr. Pihl: Yes, plus, your Honor, as the first paragraph of the policy sets forth, a 3 per cent on any dividends that were left in with the company.

The Court: Did they have a guaranteed dividend rate?

Mr. Pihl: Of 3 per cent, your Honor, a guarantee. As the policy states, the company will pay the face amount of insurance together with any dividends and interest thereon at not less than 3 per cent a year compounded annually. They did have a 3 per cent guarantee.

Mr. Bowles: I would like to submit Plaintiff's Exhibit [7] No. 1 here, which is the actual policy.

The Court: Do they provide for any stock?

Mr. Pihl: No, your Honor.

The Court: The only thing that the policy provides is for this 3 per cent dividend?

Mr. Pihl: 3 per cent interest, your Honor, compounded annually.

The Court: On dividends?

Mr. Pihl: On dividends, and interest.

The Court: It says, "Profit-Sharing.

"This policy shall participate in the profits of the company. Such profits shall be composed of (1) Savings in Mortality, (2) Profit From Lapses, (3) Interest in Excess of Reserve Requirements, and (4) Savings From Expense Loadings and in Econ-

(Testimony of Virgil N. Lee.)

omy of Management. Dividends are payable as provided in the paragraphs headed 'Dividends' on Page 2 hereof."

Mr. Bowles: The first main column.

The Court (Reading from Exhibit 1):

"Beginning at the end of the second policy year, this policy shall annually participate in the profits of the Company, as determined by the Board of Directors. Such participation shall continue while this policy is in full force on a premium-paying basis. Any dividends [8] from such profits apportioned by the Board of Directors on this policy shall at any time at the option of the Payor be either (1) paid in cash; or (2) applied to payment of premiums; or (3) applied to the purchase of non-participating paid-up insurance, without evidence of insurability, and payable at the same time and on the same conditions as this policy; or (4) left with the Company to accumulate at the rate of interest determined by the Board of Directors, but in no event less than three per cent compounded and credited annually. Such accumulations may be withdrawn in cash by the Payor on any policy anniversary or, if not withdrawn in cash, the dividend accumulations will be paid upon the maturity or expiry of the policy. If no option is selected, the dividends will be applied as provided under Option (3).

"Any apportionment, distribution of profits, or declaration of dividends shall be at the sole and exclusive discretion of the Board of Directors and

(Testimony of Virgil N. Lee.)

the methods and principles employed in the determination of such apportionment, distribution of profits, and declaration of dividends shall be conclusive upon all parties having or claiming any interest under this policy."

Why was this "profit-sharing" statement in [9] block letters, blocked? Isn't that the way every company pays dividends?

Mr. Pihl: On most policies, your Honor, 20 Pay Life do not pay any dividend, as such. They pay interest, and, as this policy sets forth, and it is my understanding that there were certain profit-sharing elements in the policy as set forth in this blocked-out area.

The Court: Perhaps we can shorten this. Do you agree that the statements were made that he talked about?

Mr. Pihl: No, your Honor.

The Court: This is a very expensive policy. One ought to get something if he pays this much premium. Proceed.

Q. (By Mr. Bowles): I will hand you now, Dr. Lee, what has been marked Plaintiff's Exhibit 4 and ask you if that was among the sales items that were shown to you during the course of your discussions with Mr. Reklau, Mr. Rognlie, or Mr. Myers? A. I believe it was, sir, yes.

The Court: Let me see it.

(Exhibit presented to the Court.)

The Court: Is there any objection?

(Testimony of Virgil N. Lee.)

Mr. Pihl: No, your Honor.

The Court: It is admitted.

(Pamphlet, "You Have Been Nominated," previously marked Plaintiff's Exhibit 4 for Identification, was received in evidence.) [10]

Q. (By Mr. Bowles): Will you explain to the Court what was told to you by the agents of the Equitable Life and Casualty?

A. By what agent?

Q. Any of the three that you have mentioned, Mr. Reklau, Mr. Rognlie or Mr. Myers, the dividend schedule as on this policy that they proposed that you take out?

Mr. Pihl: Your Honor, I will object to the answering of that question until such time as plaintiff lays a proper foundation as to when and where these conversations were and who was present.

Mr. Bowles: Very well.

The Court: You can bring that out later yourself. This is not for the purpose of impeachment. Did Mr. Rognlie tell you about the dividends that you were going to get?

The Witness: No, sir; not in its entirety, but Mr. Rognlie explained something of the policy to me, and then Mr. Myers and Mr. Rognlie came in, and I was enlightened further as to this profit-sharing policy and its nature, and at that time, I think the second visit, this book, Hidden Ways to Wealth, was left with me for me to read over and see what the virtues of these companies were and

(Testimony of Virgil N. Lee.)

what their accomplishments had been. Mr. Myers gave me some explanation. Mr. Reklau was the one who gave me most of the rundown, the figures from a so-called pitch sheet, I believe they call them.

The Court: What did he tell you? [11]

The Witness: Well, that the gist of it was that within a specified number of years, approximately seven years, closer to five, that this policy's earnings would be such that it would be self-supporting, and I would no longer be required to pay the thousand dollar premium, and that in time it would multiply itself many times the face value of the policy due to the earnings and from the amount of business the company was doing.

The Court: Proceed.

Q. (By Mr. Bowles): When was the first divident to be returnable to you?

A. At the end of the second year, as I recall.

Q. How was that dividend to be collected in respect to the premiums paid?

A. The dividend, from my figures obtained from the agents, were that it started at 8 per cent, but it turned out to be 10 per cent. That was the regular dividend. The 11.9 which represented my age group was in addition to this regular dividend, representing, as I understand, earnings of the company.

The Court: I do not know how we get the figure of 11.9.

The Witness: It was presented to me due to my age group.

(Testimony of Virgil N. Lee.)

The Court: When you are 52 years old, you get 11.9, almost a 12 per cent additional dividend?

The Witness: Yes, sir. That was from earnings that was, represented earnings the policy would earn through the business the company was doing, which returned a figure of 21.9 or $219. [12]

Q. (By Mr. Bowles): Was that calculated on the first thousand dollars that you paid as a premium?

A. After the second, at the end, or beginning of the third year's premium, that accumulated dividend then would apply to the three years' premium, and that was the earnings represented to me by Mr. Reklau.

Q. Then with respect to future dividends these payments built up, how were those to be calculated?

A. As the increased business of the company progressed, it would be increased in earnings, and as Mr. Ray Ross, the General Sales Agent, I believe, the last visit with him, informed me, it might reach 46 per cent as a company in Oklahoma had done. He did not specify what company it was.

Q. Were these dividends to be paid only on the first premium that you paid, or were they to be accumulative? A. They were accumulative.

Q. And as each successive dividend became due, it would apply on one thousand first, two thousand, and so forth?

A. Successively, yes, to the point where the policy was self-sustaining and the profit could come to me or be left to earn with the company.

(Testimony of Virgil N. Lee.)

Q. Was your policy of insurance, which is Plaintiff's Exhibit 1, was that delivered to you by any of these agents, or was it sent to you through the mail? Do you recall?

A. I couldn't say for sure, but I believe it was handed to me, [13] I believe, by Mr. Myers, because his card is included in the little packet for that purpose there. I would not swear to that, sir. I don't remember too clearly.

Q. Was there any further discussion with respect to dividends at the time this policy was delivered?

A. Yes; I could anticipate very handsome dividends; the company was doing excellent business.

Q. How many of these conferences were held between you and either Mr. Reklau, Mr. Myers, Mr. Rognlie or any of the three together?

A. It would be quite difficult to ascertain a definite number because the men would drop in occasionally, or at times I called them to verify certain questions that I wanted to know the answers to in relation to this policy.

Q. How many times would you say?

A. Oh, probably altogether maybe ten visits.

Q. I will hand you now what has been marked Plaintiff's Exhibit 6. Did you ever see such a sheet as that? A. Yes, sir.

Q. Where was that? Where did you see that sheet? A. In my office.

Q. Who showed it to you? A. Mr. Reklau.

(Testimony of Virgil N. Lee.)

Mr. Bowles: I will offer it in evidence, your Honor.

Mr. Pihl: We will object to it until such time as it is [14] shown, your Honor, when that was shown to the plaintiff.

The Court: Was that shown to you before you bought the policy?

The Witness: Yes, sir.

The Court: Do you happen to know when with reference to the date?

The Witness: It would be difficult to give you the exact date, sir. I didn't keep a note on that.

The Court: But you know it was not given to you after the policy was issued?

The Witness: No; it was not.

The Court: The objection is overruled. It will be admitted.

(Yellow sheet of longhand computations, schedule of dividends, previously marked Plaintiff's Exhibit No. 6 for Identification, was thereupon received in evidence.)

Q. (By Mr. Bowles): Did Mr. Reklau explain to you what the figures on the sheet represented?

A. Mr. Reklau took from that sheet figures in answer to questions that I asked.

The Court: Where is this list of questions that you asked him? You said in your deposition that you kept a book in which you listed a number of questions that you were going to propound to [15] him.

(Testimony of Virgil N. Lee.)

The Witness: We may have them in the papers, sir. I simply made notes on them, and, in addition, were these questions that I wanted to know about.

(Document presented to the Court.)

The Court: Have they been marked?

Mr. Bowles: They have not been marked, your Honor. They were just his notes.

The Court: Mark them.

(Document containing notes above referred to was thereupon marked Plaintiff's Exhibit 7 for Identification.)

Q. (By Mr. Bowles): Do you recollect without the aid of your notes any questions that you asked Mr. Reklau relating to this?

A. One of the questions was primarily if in the event of failure of this company, what protection did policyholders have, and Mr. Reklau informed me that it was very similar to a member of the Federal Reserve system in banking. In other words, if the company should get in financial straits or should fail, not the banking group but the underwriting group would simply step in and take over, and the policyholders would never know that the company had failed. We were protected to that extent.

Q. Did you ask him any questions relating to the dividend structure of this company?

A. Yes, sir.

(Testimony of Virgil N. Lee.)

Q. I will hand you what has been marked Plaintiff's Exhibit 7. [16]

The Court: Do you need it to refresh your memory?

The Witness: Not necessarily, your Honor.

The Court: Do not use it, then.

Q. (By Mr. Bowles): All right. What were the questions you asked?

A. One of the questions, to begin with, was how did we arrive at these very handsome profits that were indicated, and that is when were involved the factors, I believe, of lapses, company earnings, management, and increased new business, and this profit-sharing basis would give us far more handsome returns than ordinarily enjoyed by even a stockholder.

Q. Then did he tell you at any time what you could expect in the way of dividends from a policy such as he was proposing to sell to you?

A. By the third year he anticipated 25 per cent minimum returns on this investment.

Q. You state that Mr. Reklau took figures from this yellow sheet, which has been marked Plaintiff's Exhibit 6, in response to questions that you asked him? A. Yes, sir.

Q. Do you know what questions you asked him?

A. The questions were on from one to five or seven or ten years what we might anticipate in this and out of this. He held that sheet himself, but he gave me the quotation on these figures based on the investment program set up and as it would apply

(Testimony of Virgil N. Lee.)

to [17] us being preferred individuals in the company, that it was a scale, but I did not get all the figures down.

The Court: Do I understand that it was anticipated that at the end of twenty years you would get $443,373?

The Witness: That is the figures on the sheet, sir. He did not give me the exact amounts. We didn't reach that point.

The Court: That was a little too much for him?

The Witness: Yes; that was a little rich.

The Court: That was for only paying a thousand dollars for three years?

The Witness: No, sir; that was twenty years.

The Court: Yes; you would pay the thousand dollars every year, though?

The Witness: Yes, sir.

The Court: At the end of the sixth year you would get back $1,318?

The Witness: I believe the figure is approximately correct, sir.

The Court: At the tenth year you would pay them a thousand dollars, and they would pay you $7,488.65?

The Witness: If that is included in the sheet, that would be the figure.

The Court: Didn't you get rather suspicious when he was giving you these figures?

The Witness: Yes, sir; and I tried to ascertain the position [18] of the company and its worthiness, its integrity.

(Testimony of Virgil N. Lee.)

The Court: How did you do that?

The Witness: Through The First National Bank, a representative, the financial adviser; through the Weatherly Insurance Agency, through the brokerage house of Foster & Marshall, and then I believe the president of an underwriter's association, Mr. Sid Klein. I had a conference with him.

The Court: Did you tell him what representations were being made to you at the time?

The Witness: Yes, sir.

The Court: What did they tell you?

The Witness: I was either lucky or foolish, they didn't know which, to be able to get hold of something as good as this. If it was valid, it was extremely good; if not, then it was not good, but I could not find anything to militate against the company.

The Court: You didn't talk with Mr. Bowles at that time, though, did you?

The Witness: At that particular time I don't believe I had. Later Mr. Bowles and I discussed the matter.

The Court: Was that before you took out the policy?

The Witness: After I had taken my policy, sir.

The Court: I assume that because he is in court here now, but did you really believe that when you paid a thousand dollars a year that at the end of the tenth year you would be getting [19] back, if everything worked out all right, about $7,500?

The Witness: Individually, and, as I recall my

(Testimony of Virgil N. Lee.)

figures, no. That was, that figure would be approximate for my son and for myself. I had a policy for him.

The Court: That is for the two of you?

The Witness: Yes, sir.

The Court: How old was your son?

The Witness: He was nine at the time, I believe, sir.

The Court: Were you paying a thousand dollars for him, too?

The Witness: Yes, sir.

The Court: Did you ever ask them for a form of policy that you were going to get, or an agreed contract?

The Witness: I did, sir, and I asked for a financial report from the company to see what the company was doing.

The Court: Did you get them?

The Witness: No, sir.

The Court: Proceed.

Q. (By Mr. Bowles): You say that Mr. Myers discussed this policy with you and the dividend structure after it was delivered to you?

A. As I recall, yes, sir.

Q. Did you have conferences with respect to the dividends immediately after the policy was delivered, with Mr. Reklau? A. Yes, sir. [20]

Q. Did they again go into this proposition of these——

A. Mr. Reklau—Mr. Myers did not at future dates because Mr. Reklau took over, and I did—

(Testimony of Virgil N. Lee.)

most of the business was transacted with him from that point on.

Q. I will ask you this: The representations that were made to you with respect to the investment potentials of this policy, did you rely on those statements in the purchase of your policy?

A. Yes, sir.

Q. You have already testified that you made such investigation as you could with respect to this company? A. Yes, sir.

Q. Would you have purchased this policy had you known these statements were not going to be carried out?

Mr. Pihl: Your Honor, I object to that question as a leading question. He is leading the witness into an answer with this question.

The Court: I think he is not putting any words in his mouth.

Q. (By Mr. Bowles): What is your answer?

The Witness: No; I would not. I did not want insurance. As stated before, sir, I was looking for investment income.

The Court: This was better than an oil well, wasn't it?

The Witness: Slightly.

Q. (By Mr. Bowles): I will hand you what has been marked Plaintiff's Exhibits 8 and 9. [21]

The Court: Who gave you these figures in Plaintiff's Exhibit No. 6? Who handed them to you?

The Witness: The figures—you mean originally, sir?

(Testimony of Virgil N. Lee.)

The Court: Yes; whose writing is this?

The Witness: I do not know.

The Court: Who gave it to you?

The Witness: Mr. Bowles, I believe.

Mr. Bowles: No; you have testified, Dr. Lee——

The Witness: Oh, that—you mean originally, sir? That was the one that Mr. Reklau put before me and then took figures from. I didn't, other than to look at it and at a few columns there, I did not analyze the entire thing.

The Court: Did he give it to you to keep?

The Witness: No, sir.

The Court: This is what he took back?

The Witness: Yes, and then from that he took various figures to prophesy the future earnings of the policy.

Mr. Holman: Your Honor, we object to the admission of the Exhibit No. 9 in this case.

The Court: Apparently that is a mistake.

Mr. Bowles: I have the wrong letter marked.

The Court: 9 is withdrawn?

Mr. Bowles: Temporarily.

The Court: Is this company doing business in Oregon, the Equitable Life? [22]

Mr. Pihl: Yes, your Honor.

(Letter of January 20, 1959, to Dr. Virgil N. Lee from Equitable Life and Casualty, was marked Plaintiff's Exhibit 17-B for Identification.)

Mr. Bowles: This is Defendant's Exhibit 17 as it is already listed in the pretrial.

(Testimony of Virgil N. Lee.)

The Clerk: I have already marked it Plaintiff's Exhibit 17.

The Court: Is this different? What is it you want to know from this?

Q. (By Mr. Bowles): Together with Plaintiff's Exhibit 8, did you receive the letter and the check?

A. Yes, sir.

Q. Did you receive previously a check from the defendant insurance company?

A. Yes, sir; same amount.

Q. What amount? A. $100.

Q. Approximately what time was that received?

A. At about the time the third-year premium was due.

Q. Did you cash that first check?

A. I applied the first check to the third-year premium, sir.

Q. In other words, for the third-year premium you only paid actually $900? [23]

A. $900 plus this dividend check.

Mr. Bowles: We are going to offer Plaintiff's Exhibit No. 5, Plaintiff's Exhibit No. 8, and Defendant's Exhibit No. 17-B (sic) into the record at this time, your Honor.

The Court: Is there any objection?

Mr. Pihl: We would like to look at it. We have no objection to 5, your Honor.

Mr. Holman: Your Honor, this is not a defendant's exhibit here, 17-B. We never listed that as an exhibit. This is one year later, and letter and check of Exhibit 17, which—this is a second dividend

(Testimony of Virgil N. Lee.)

check here and letter, and the first was January, 1958. This is January, 1959. We have no objections to it other than that; just the proper listing of it.

The Court: It is admitted.

(Letter previously identified as Plaintiff's Exhibit 17-B for Identification was thereupon received in evidence.)

(Check payable to Dr. Virgil N. Lee for $100, numbered G84741, previously marked Plaintiff's Exhibit 8 for Identification, was thereupon received in evidence.) [24]

Q. (By Mr. Bowles): Are you prepared at this time to return the $100 that you received from the company in January, 1958? A. Yes, sir.

Q. When was the first time that you learned that the company was repudiating the statements that had been made to you by Mr. Reklau with respect to dividends?

A. By the time the third share or premium was due. Before that it was impossible to pick it up for the simple reason we had nothing to go on, but when the dividends and earnings failed to materialize, that is the time I wrote to the head office to ask them what had happened to the dividends, why they had not been received.

Q. Had you paid your premium at that time?

A. I did pay the premium, sir.

Mr. Bowles: You may cross-examine.

The Court: When was that date, do you remember?

(Testimony of Virgil N. Lee.)

The Witness: It was around the 26th of January, I believe.

The Court: This year?

The Witness: No, sir; 1958, sir.

Cross-Examination

By Mr. Pihl:

Q. Dr. Lee, when was the first time that you saw an agent of the Equitable? You stated it was some time during the year 1955. Could you give us the month? [25]

A. As close as I could give you, sir, would be somewhere around the first of September.

Q. So that would be approximately September 1, 1955? A. I believe that is correct.

Q. You stated that that is Mr. Leo Rognlie?

A. That was Mr. Rognlie, yes.

Q. Was he by himself at that visit?

A. Yes, sir.

Q. I think you stated that you talked about health and accident? A. Yes, sir.

Q. When was the second visit from any agent from Equitable; just the month, the approximate date?

A. Well, some time later in the month, probably ten days to two weeks it might be, that Mr. Rognlie and Mr. Myers may have been at that time. I couldn't verify that accurately because I did not keep a record of it. It was casual conversation.

Q. When did you start keeping a record of these meetings?

(Testimony of Virgil N. Lee.)

A. I started taking notes and asking questions at the time I had decided if the policy was as it was represented I would take it. Then I was asking questions and endeavoring to obtain answers.

Q. What was the approximate date when you first started taking notes?

A. Oh, that would probably be around October, somewhere in [26] there.

Q. Some time in October, 1955?

A. Possibly so at that time.

Q. On this second meeting you say that Mr. Myers came with Mr. Rognlie?

A. As I recall it, sir.

Q. You discussed this policy which is in question today?

A. The profit-sharing policy was brought to my attention, and we began the discussions on the thing. The question was not as insurance as such but the fact that it was an investment-income thing which I was interested in and not as insurance.

Q. You stated on direct examination that they brought out certain dividend provisions which you would be entitled to? A. Yes, sir.

Q. And they gave you certain figures. Now, what did they base these figures on?

A. The volume of business, I believe, as near as I could understand, that the company was doing, and their anticipation of the tremendous increase in business.

Q. In other words, this money that you were to

(Testimony of Virgil N. Lee.)

receive by way of dividend was from anticipated earnings?

A. Not entirely; that to begin with the 3 per cent factor was in the policy, but the 8 per cent factor was there that was—well, I believe he assured that we would—8 per cent would be about the minimum we would receive. This is verbal and not in [27] writing; that is, I had no letters or documents from the agents or the company to sustain this, but I do have some notes to that effect.

Q. In other words, you were practically guaranteed an 8 per cent return on your premium; is that what you are saying?

A. That statement was made to me by Mr. Reklau, that he would guarantee a minimum of 8 per cent.

Q. When was the first meeting with Mr. Reklau?

A. That was after Mr. Myers had been in my office probably twice. I believe Mr. Reklau and Mr. Rognlie came together to discuss this profit-sharing policy. The exact date I can't tell you.

Q. This was before you purchased this policy that is in question today? A. Yes.

Q. You did purchase, as you have stated on direct, another policy?

A. Two policies were purchased, sir.

Q. You purchased one for your son?

A. Minor son, yes.

Q. When was that purchased?

(Testimony of Virgil N. Lee.)

A. That was approximately one year after I purchased my policy.

Q. Is it an identical policy?

A. Except for the age features, yes, and the interest which in his age group, which was 7.7, if I am correct, and that was in [28] addition to the regular 10 per cent dividend.

Q. I am talking about the policy itself. Was the policy the same except for the age of the insured?

A. Yes; that is, the premiums and such, yes, it would be the same.

The Court: Did you pay a thousand dollars a year for the boy, too?

The Witness: Yes, sir.

Q. (By Mr. Pihl): But the face amount is different?

A. It is much greater than my policy.

Q. That is, of your $16,000?

A. Yes. His was thirty-five something.

Q. Did Mr. Reklau ever come to your office prior to the buying of this policy, unaccompanied by anyone else? A. Yes.

Q. When was that first visit by him alone?

A. Well, to quote you the exact date, sir, as to the other visits would be extremely difficult. I did not make a record of that exact date, but he was in my office a number of times alone.

Q. Before you purchased this policy?

A. Yes, sir.

Q. When is the first time you saw Plaintiff's

(Testimony of Virgil N. Lee.)

Exhibit, well, the one with the long columnar figures on it?

A. I would say that was probably the second or third time that [29] Mr. Reklau was in my office. He was alone at that time.

Q. When was that, approximately, in relation to the date you purchased this policy?

A. It would be very close to the purchase date.

Q. You did receive a dividend under this policy, did you not?

A. I believe it was classified as "President's Special Dividend."

Q. What was the amount of that?

A. $100.

Q. You received that January 20, 1958?

A. Let's see; that would be at the end of the second year. Yes; that is the one I applied——

Q. Then you paid your third-year premium with that $100 and $900 more? A. That is correct.

Q. So you paid your third premium after knowing what your dividends were; correct?

A. I had no way of ascertaining what my dividends were. I wrote to the company and asked what it was, and at the same time I received the denial of all facts quoted to me.

The Court: Do I understand this correctly: You paid the $100 that you received as a dividend plus $900 more?

The Witness: Yes, sir.

The Court: For the third year, and at the same

(Testimony of Virgil N. Lee.)

time you wrote the company asking them where your other dividends were? [30]

The Witness: That is correct. I had to pay the third-year dividend to protect myself from loss of the policy and everything it represented until I could find out what this was all about. In other words, I was sustaining myself during that time.

The Court: Were you suspicious that the company was not going to be able to comply?

The Witness: My suspicions were around, sir, that something was wrong.

The Court: When?

The Witness: By the fact that I had not received any earnings in addition to the regular dividend.

The Court: When you got the $100?

The Witness: Yes.

The Court: So, therefore, you wrote to the company, wondering where the other dividends were?

The Witness: That is correct.

The Court: Is it your testimony that prior to the time you received the $100 dividend that you did not know at any time that the dividends that were represented to you would not be forthcoming?

The Witness: I did not, but I tried to find out by asking for a financial sheet from the company, a report on their business, but I didn't get it.

The Court: Then you wrote to the company for a statement [31] as to where the other dividends were, and at that time you learned from them that there were no other dividends?

(Testimony of Virgil N. Lee.)

The Witness: That is correct. They denied the existence of any such rate schedule, the age group, or anything else of that nature.

The Court: Then what did you do?

The Witness: Then I went to legal counsel and started operations. I went to the State to find out what they represented because the State officials had been in my office twice asking questions.

The Court: Before that time?

The Witness: Yes, sir.

The Court: In other words, prior to the time you got the $100 dividend, the State officials were in your office?

The Witness: Yes, sir.

The Court: What did they tell you?

The Witness: They were investigating the company. They had various agents, the same agents that had discussed the thing with me, before the Commission down there, trying to find out just what was going on.

The Court: In other words, when you paid that $900 you knew that the company was under investigation?

The Witness: I knew the company had been before the State Commission to ascertain various facts, but I was not positive. I had not been informed what these facts were. [32]

The Court: Why didn't you write to the company first and ask them what dividends they were going to pay?

The Witness: Well, according to the way the

(Testimony of Virgil N. Lee.)

information was given me, sir, they didn't know at the time, but it would be handsome. That was the expression used.

The Court: Proceed.

Q. (By Mr. Pihl): At any time did Mr. Ray Ross, General Sales Manager at Equitable, ever call at your office? A. Yes, sir.

Q. In person? A. Yes, sir.

Q. When was that?

A. The first time would be somewhere within around the end of the first year or early the second year. He complimented me most highly on how much good I had done the company by my good name and my position.

Q. Did you discuss dividends with Mr. Ross prior to receiving your first dividend check?

A. No.

Q. Did he tell you who determined the dividends? A. At the second meeting, yes.

Q. When was the second meeting?

A. I believe it is in a set of notes that I have there of the conversation with Mr. Ross, the exact date. Counsel could probably find it. [33]

Q. Do you need those notes to refresh your memory?

A. Not necessarily other than if you want me to quote exactly what questions were asked and the replies from Mr. Ross.

Q. What date was the second meeting? Would you look at the papers?

A. That was, wait a minute, it is listed here.

(Testimony of Virgil N. Lee.)

The Court: Was that after you paid your third premium?

The Witness: Yes, sir.

The Court: You may look to verify that fact.

The Witness: The date that Mr. Ross was in my office was February 12, 1958, 10:00 a.m., in the morning.

Q. (By Mr. Bowles): Was that his first meeting?

A. His second. That is after I had written to the home office to find out about these things.

Q. But before you paid your second premium?

A. No, sir; I had already paid the premium.

Q. You had already paid the third premium?

A. Yes, sir; that is due January 26th, as I recall.

Q. What was said by Mr. Ross at that meeting?

A. The first question was, "Are the dividends accumulative in successive years?"

Mr. Ross answered No, it can be—that is, $100, 10 per cent, or $200 the second year or whatever it happens to be in an increase as the shares of the unit came into effect. Now it can be 3 per cent as the policy indicates, if necessary. [34] The dividend is 10 per cent at present or $100 per year regardless of the amount paid in; no earnings the first year due to the cost of handling the policy and such things as records in a business way. It might increase to 46 per cent dividend within the next two or three years, as in the case of the company in Oklahoma. That is when that statement was made.

(Testimony of Virgil N. Lee.)

The second question was, "Does the policyholder have any possibility of recovery of funds paid in when the policy was so old with fraud and misrepresentation by the district agent or agents of the company?"

"No," was his answer, "the company is not responsible for any statement made by its general agent or agents regarding the fraudulent or misleading statements. The policy contains a clause protecting the company against any such act or acts."

Q. Do you have notes of your first conversation with Mr. Ross?

A. No; there was no necessity for notes for the simple reason it was a complimentary call, and I was graciously then complimented for how much good I had done the company.

Q. Getting back to this long schedule in this columnar exhibit, you said, I believe, in response to a question by the Judge, that this was included for the two policies; right?

A. The same profit-sharing rate of earnings was to apply to both policies individually.

Q. On direct examination didn't you say that the figures which Mr. Reklau quoted to you were inclusive for the two policies? [35] The policies are separate and distinct entities?

A. My policy was one thing; that of my son, another; but the projection sheet or this yellow sheet as it is recognized, applied the same way to

(Testimony of Virgil N. Lee.)

either policy, not collectively, if that is the question you are asking, sir.

Q. Do you know as a matter of fact whether that is the exact figures that Mr. Reklau gave you? Is that the exact piece of paper?

A. It is a duplicate of it, so far as I can recall, sir.

Q. In other words, that is not the original of what Mr. Reklau gave to you?

A. I could not say that three years later, sir.

Q. Therefore, you don't know whether the figures on that are correct?

A. The figures, the beginning column of figures are the figures.

Q. You remember that?

A. I remember certain figures there. I did not keep the sheet. I didn't have time for that. It was shown to me then from that. The explanation of the potential and possible earnings of these policies and the volume of company business was projected for my benefit.

Q. Was not this when Mr. Reklau was talking to you about purchasing the second policy for your son?

A. I don't recall that having any influential bearing for the purchase of the second policy. I was asking questions primarily [36] for the first policy, my policy upon which I hoped to do financially well for my minor son.

The Court: There is a note here that, "This schedule was received about the middle of October,

(Testimony of Virgil N. Lee.)

1956, or the first of November." Was that just before they sold you the policy for your son?

The Witness: I don't recall the exact date of the purchase of his policy, sir. It was approximately one year later.

Mr. Bowles: January 20, 1956, your Honor.

The Court: Whose writing is that?

Mr. Bowles: Dr. Lee's.

The Witness: That is my policy, sir.

Mr. Bowles: I was going to explain to the Court that that particular sheet of paper was never in Dr. Lee's possession. I have other witnesses to explain when and how that came into being and where it came from.

The Court (Quoting): "This was given to me not later than one week after I took my licensing exam." When was that?

Mr. Bowles: That is what this witness will explain for you, also.

The Court: Is there any further cross-examination?

Mr. Holman: I am wondering, your Honor, if we could study the notes for a moment and then ask him questions concerning them?

The Court: Yes. [37]

Mr. Holman: If we could have a short recess to study them, we would appreciate it, your Honor.

The Court: When did you find out about these notes?

Mr. Holman: We didn't know what they were or where they were.

(Testimony of Virgil N. Lee.)

The Court: I found out about them in the depositions.

Mr. Holman: We will go through them rapidly.

The Court: Call your next witness. [38]

CECIL I. HUST

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bowles:

Q. Mr. Hust, what is your occupation?

A. I am an agent for Bankers Union Life Insurance Company.

Q. How long have you been in the life insurance sales business?

A. I started in September, 1954.

Q. For what company did you go to work when you started? A. Equitable Life and Casualty.

Q. Who was the agent, the general agent, for whom you worked? A. Walter A. Reklau.

Q. How long were you with that company?

A. I was with that company until about the middle of 1957. I dissolved partnerships with Reklau in January, 1957.

Q. During the course of that time where was the office of Equitable Life and Casualty Insurance Company in Portland?

A. At first it was in the Loyalty Building, and

(Testimony of Cecil I. Hust.)

then they moved to 32nd and Burnside on the East Side.

Q. During the course of time, was Mr. Ray Ross of the home office at any of your meetings here in Portland? A. Several times.

Q. Was the policy of insurance that we have been discussing here this afternoon, was that discussed by Mr. Ross with your [39] sales people?

A. Yes.

Mr. Pihl: Your Honor, I object to that question. It is not relevant whether or not Mr. Ross discussed this policy with the sales agents. The question here is whether certain facts were misrepresented to the plaintiff.

The Court: You are denying that the company is liable for it because it was made without authority, and he is trying to show, apparently, that when the sales manager—for instance, when the president of the company came out and told an agent to say something to a prospective customer, don't you think that the company would be bound by it?

Mr. Pihl: Yes, your Honor.

Mr. Bowles: That is precisely the question.

The Court: The objection is overruled.

Mr. Pihl: We have not denied the agency, though, your Honor. We have admitted that Mr. Reklau is our general agent.

The Court: Yes, but do you admit that any statements made by Mr. Reklau or by the other agents pursuant to Mr. Reklau's direction would be binding upon the company?

(Testimony of Cecil I. Hust.)

Mr. Pihl: Yes, those statements made prior to June 20, 1956, which was the date of issuance of the policy.

The Court: What is it you want to show by this witness?

Mr. Bowles: All I want to show is that Mr. Ross knew of this policy and made certain guarantees to the agents who were [40] selling it with respect to how long it would take this policy to be paid up. That is the question that would immediately follow.

The Court: The objection is overruled. I am going to listen to the testimony.

Q. (By Mr. Bowles): Were any statements made by Mr. Ross with respect to the length of time it would take this policy to pay itself out?

The Witness: Yes, sir.

Q. Will you tell the Court what they were?

A. Mr. Ross made a statement that it would pay itself out in approximately four years—four full premiums—I will retract that—four full premiums to be stretched over six or seven years, keep dropping each year.

Mr. Bowles: If the Clerk will hand Mr. Hust Plaintiff's Exhibit 6, please——

The Court: What is it?

Mr. Bowles: It is that yellow sheet. That is the one.

(Document presented to the witness.)

Q. (By Mr. Bowles): Were those sheets in use during the time that you were selling for Equitable Life and Casualty Company?

(Testimony of Cecil I. Hust.)

A. They were issued, I think, to every salesman.

Q. By whom?

A. They were issued by Mr. Reklau.

The Court: Is there anything further? [41]

Mr. Bowles: That is all I have.

The Court: You may cross-examine.

Cross-Examination

By Mr. Pihl:

Q. When were those issued to each salesman?

A. The exact date, I would hesitate to even attempt to give you the exact date.

Q. So you don't know when those were issued?

A. They were issued shortly after we moved out to 32nd and Burnside. Now, the date of that I don't know. I have one.

Q. Would you look carefully at that exhibit, and do you note a notation on there? Do you notice a notation on there?

A. Well, there is two on here.

Q. Would you read them?

The Court: Who put them on?

Mr. Pihl: Yes, did you put them on?

The Witness: Did I put them on?

Q. Yes. A. These notes here?

Q. Yes. A. No, sir.

Q. Have you ever seen that particular form before? A. I have seen this form, yes.

Q. No, I mean the particular one, the one you have. [42]

(Testimony of Cecil I. Hust.)

A. Well, that would be hard to say. I have one just like it, if you want to see it, the same handwriting.

Q. You do not have the slightest idea when those were handed out by Mr. Ross? A. By who?

Q. You said Mr. Ross came——

A. I didn't say Mr. Ross.

Q. ——came to Portland.

A. I did not say Mr. Ross passed these out. I said Mr. Reklau.

Q. Mr. Reklau passed those out?

A. Yes, sir.

Q. You don't know when he passed them out?

The Court: He said shortly after they moved to 32nd and Burnside. You may develop that.

Q. (By Mr. Pihl): When did you move to 32nd and——

The Court: He does not remember.

The Witness: I don't remember the exact date.

Q. (By Mr. Phil): Do you remember the year?

A. I think it was—I think it was the latter part of 1955. I am not sure.

Q. Latter part of 1955. How long would you say "shortly" was; just estimate? You say it was shortly after you moved.

A. Well, they were given out about the time—they were breaking in or training three new salesmen, and they were given out about the time those three salesmen started, Mr. Nadeau, [43] Mr. Martin, and Mister—I can't think of the other one's name—because that is when they came out with

(Testimony of Cecil I. Hust.)

these, is when they were three new men. After we moved to 32nd and Burnside is the first I saw of them, anyway.

Mr. Holman: We will develop that later on, your Honor.

The Court: Very well.

Q. (By Mr. Pihl): When did you leave Equitable? A. It was along the middle of 1957.

Mr. Pihl: No further questions.

The Court: That is all.

(Witness excused.)

Mr. Holman: May we have Dr. Lee recalled on continued cross-examination?

The Court: Very well. [44]

VIRGIL N. LEE

the Plaintiff herein, thereupon resumed the stand as a witness in his own behalf and was examined and testified further as follows:

Cross-Examination
(Continued)

By Mr. Pihl:

Q. The figures which you have set forth in those notes relating to profits to be derived, do you find that page where in your own handwriting you have set forth certain figures?

A. Yes, there are several here, sir.

Q. All of those relate to anticipated profits, do they not?

A. These relate to anticipated profits and the ex-

(Testimony of Virgil N. Lee.)

planation of the figures that were given to me by the agents.

Q. Are you referring to that Plaintiff's Exhibit No. 6 now?

A. Not at this time. These were taken prior to that, various phases here.

Q. But these figures which you have are the expected earnings of the company?

A. Relatively so, yes.

Q. Now, the figures which the agents gave you, were they not the experience of other companies? There are, I think you said, fifteen companies or something like that?

A. That was in the book, Hidden Ways to Wealth, as an illustration on what the facts showed, what they had done.

Q. Did you actually expect to earn the money which was on Plaintiff's Exhibit No. 6, would you say? [45]

A. That was my expectancy, sir. That was the figure quoted to me by the general agent of the company. If it happened that way, very well, but I would be moderately satisfied with considerably less.

Q. In other words, you didn't rely on those figures there, did you?

A. I did not peruse the entire chart, so I could not give you the entire list of figures, but I did anticipate to receive a facsimile in a reasonable scale of returns.

Q. When you received your policy you did read it, did you not, Doctor?

(Testimony of Virgil N. Lee.)

A. I analyzed the policy as best I could, sir.

Q. Did you read that portion relating to dividend payments?

A. I read—I couldn't quote it to you, but I presume I read that.

Q. Do you recall what it said as far as who was to determine what the dividends were going to be?

A. Yes.

Q. What did the policy say in that respect?

A. As I recall now, the Board of Directors determined this. That's about all I could quote to you on it.

Q. In other words, it was silent as to amounts but just said that the Board of Directors would determine the dividends? A. I believe so.

Q. Did that arouse your anticipations? [46]

A. Not necessarily. If the word of the general agent and agents were to be accepted and the facts or figures quoted to me, the expectancy of the company, what they were doing and what they anticipated doing, then it would be—they could not write that in the policy I do not presume, but, nevertheless, they assured that that would be the case, that we could have these earnings.

Q. In other words, we are back to the story that all of these earnings were anticipated; right—anticipated future earnings?

A. Not necessarily so. May I correct that that a minimum of 8 per cent was quoted me, but 10 per cent was actually what was happening, and the 11.9

(Testimony of Virgil N. Lee.)
was a fact; that was established, as represented to me.

The Court: Are there any further questions?

Mr. Pihl: That is all.

The Court: That is all.

(Witness excused.)

The Court: We shall take a ten-minute recess.

(Recess taken.)

Mr. Bowles: I would like to call Mr. Hust back to the stand by reason of the fact that I have learned he has letters [47] in his possession that I thought were in the files of the State Department, and I want the notes of the State Department to be in here.

Mr. Holman: Your Honor, we have looked at these letters and would like to object to their admission.

The Court: There is no question about the identification of the letters?

Mr. Holman: I don't know who the signatures are, your Honor. I am not familiar with them, but we object to them on the ground they are immaterial and irrelevant in this case.

The Court: Let me see them.

(Documents presented to the Court.)

Mr. Holman: What we are concerned with in this case is the representations made by particular agents, which the plaintiff has named, that were

made to him in the course of selling this insurance policy.

There is nothing in there about representations made to Dr. Lee in the sale of this policy, and I cannot see that these letters should be admitted for any reason. Mr. Hust had no contact whatsoever with Dr. Lee. He did not sell the policy to him, and what bearing these letters can have on that I do not know.

The Court: Recall Mr. Hust. [48]

CECIL I. HUST

was thereupon recalled as a witness in behalf of the Plaintiff and, having been previously duly sworn, was examined and testified further as follows:

The Court: When was the policy received by Dr. Lee?

Mr. Bowles: Shortly after the date—it is in January of 1956, your Honor. These letters, of course, bear a date subsequent to that, but what we are offering them for is just to show the consistent policy in backing up the statements and figures that were made to Dr. Lee.

The Court: I am going to overrule the objection and permit them to be admitted.

(Letter of February 13, 1956, from Equitable Life and Casualty Insurance Company to C. I. Hust, previously marked Plaintiff's Exhibit 10 for Identification, was thereupon received in evidence.)

(Photostatic copy of letter of February 9, 1956, from Equitable Life and Casualty Insur-

(Testimony of Cecil I. Hust.)

ance Company to Walter A. Reklau, previously marked Plaintiff's Exhibit 11 for Identification, was thereupon received in evidence.)

The Court: That is all.

Mr. Bowles: You may step down, Mr. Hust.

Mr. Pihl: Your Honor, I would like to ask Mr. Hust one question. [49]

Q. Mr. Hust, did you ever use the figures that you have testified to here today in the sale of any policy?

The Court: That would not make any difference. That is immaterial to this case whether he sold them to somebody else. That is immaterial.

Mr. Pihl: Your Honor, what I am trying to show is that Mr. Bowles has said this has been a consistent policy of the company, and I wanted to find out if other agents used these figures, too, as part of their sales pitch, as Mr. Bowles refers to it.

The Court: The question is did Mr. Reklau use it.

Mr. Pihl: Or Mr. Rognlie or Mr. Myers, yes.

The Court: What Mr. Hust did would be of no consequence to me at all. It would be of no consequence to the case. That's all.

(Witness excused.) [50]

NEIL D. NADEAU

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bowles:

Q. Mr. Nadeau, what is your occupation, sir?

A. Well, at the present time I am an underwriter for Bankers Union.

Q. How long have you been in the life insurance sales business?

A. I have been in the life insurance sale business since August or September of 1956.

Q. Whom did you first go to work for; what company did you first go to work for in that business? A. Equitable Life and Casualty.

Q. Who was the general agent when you first went to work? A. Walter A. Reklau.

Q. That was in the Portland area?

A. That was at 32nd and East Burnside.

The Court: What do you want to develop by this witness?

Mr. Bowles: He is the witness that will identify Plaintiff's Exhibit No. 6, your Honor. It was his, that so-called pitch sheet they were asking questions relative to the——

The Court: This was sometime after the sale?

Mr. Bowles: That's quite right.

The Court: When did you get this pitch sheet or—— [51]

The Witness: This sheet was given to me the day that I went to work for Mr. Reklau.

(Testimony of Neil D. Nadeau.)

The Court: You don't know when, if ever, Dr. Lee got those figures, do you?

The Witness: No, I do not.

The Court: That is all.

Mr. Bowles: That is all.

The Court: Is there any objection?

Mr. Pihl: No.

The Court: That is all. Thank you.

(Witness excused.)

Mr. Bowles: I have one more witness that I can call. His testimony will only be cumulative of what has already been given.

The Court: On what issue?

Mr. Bowles: On the issue of Mr. Ross making a statement with respect to what this policy would do.

The Court: When was the statement alleged to have been made?

Mr. Bowles: In 1953 or '54.

The Court: We will hear him on that. [52]

DON PRUITT

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

The Court: Were you ever employed by Equitable Life and Casualty Company?

The Witness: I have been; yes, sir.

The Court: During what years?

The Witness: Oh, from 1953——

The Court: Past 1956?

(Testimony of Don Pruitt.)

The Witness: Yes, I think it was in the summer or fall of 1957, your Honor.

The Court: Do you recall a meeting at which Mr. Ross was present?

The Witness: Several of them.

The Court: Do you recall a meeting at which Mr. Ross discussed the dividend payments in a 20-pay-life policy, profit-sharing policy?

The Witness: Yes, I do.

The Court: When did that take place?

The Witness: Well, I don't know that I can recall the exact date. He was present at several meetings at which various phases of the policy were discussed.

The Court: This 20-payment-life and profit-sharing policy was discussed?

The Witness: Yes, that was the only policy I had anything [53] to do with. That was the first policy they brought out, and that was the one that they sold for a number—or along until after I left the company.

The Court: Was this their principal policy? Was this the policy that they sold most frequently?

The Witness: That was the only policy they sold, the only policy they had any license to sell.

The Court: Did Mr. Ross give you an estimate of how much dividends would be payable on this policy?

The Witness: Yes, he did in various ways when I first went with the company.

(Testimony of Don Pruitt.)

The Court: When you first went with the company, you had what?

The Witness: I had a sheet there showing a record of a policy issued by the Kansas City Life Insurance Company, which this record showed that the Kansas City Life had paid dividends starting at 25 per cent the first dividend and increasing 15 per cent a year to the end of the 20-year period, and he made a statement that his company would pay at least as much in dividends as was paid by the Kansas City Life.

(Document presented to the witness.)

The Court: Did you ever see that sheet or a similar one?

The Witness: Not while I was employed by the company.

The Court: You never saw that?

The Witness: No, not this one. [54]

The Court: Did you see one like it?

The Witness: No, I never saw any record of this kind that I recall during that time.

This came up about the time that I was discharged by the company.

The Court: In connection with this 20-pay-life policy, did you understand that it was in the nature of a stock deal?

The Witness: No, there was no stock involved in any way that I know of. It was merely a straight insurance policy that would have paid out, would continue for the twenty years, and that the policy-

(Testimony of Don Pruitt.)

holder would get these dividends starting at 25 per cent and increasing 15 per cent a year to the end of the twenty years.

The Court: When would he stop paying the premiums, then?

The Witness: He would stop paying premiums, I think, in the eighth year. I think the policy would become paid up. You see, in this, with this policy you paid the first-year premium in full and the second-year premium in full, and after that your dividends started at 25 per cent and increased each year 15 per cent. At the end of the eighth year your policy would be paid up and you would have no more expense in connection with it, and your dividends would continue, and the excess of the dividends over the cost of the premium would be a credit to the policyholder.

The Court: In other words, if this policy was a $16,000 [55] policy for twenty payments of $1,000 each, this excess would be added to the face amount of the policy?

The Witness: I think you had the right of doing that. You could leave your dividends to accumulate there and become payable with the policy.

The Court: Will you speak a little louder? You had a right to that, and these dividends would be payable with the policy?

The Witness: Yes, they would be paid; you could leave them, or you could take them in cash.

The Court: Is there any cross-examination?

(Testimony of Don Pruitt.)

Cross-Examination

By Mr. Pihl:

Q. Just one question, your Honor. You say that this yellow sheet, Plaintiff's Exhibit 6, was passed out about the time you left the company?

A. I think, as I recall, that came out after I left the company.

Q. You said you left the company in 1957?

A. 1957, I think so.

Mr. Pihl: That is all.

The Court: That is all.

Mr. Bowles: That is the plaintiff's case, your Honor.

The Court: Plaintiff rests?

Mr. Bowles: Yes, your Honor. [56]

The Court: Mr. Pihl, call your first witness.

DEFENDANT'S MOTION FOR NONSUIT

Mr. Pihl: Your Honor, at this time defendant would move for a nonsuit by and for the reason that plaintiff has failed to prove the material allegations——

The Court: I think the plaintiff has amply proved it. The motion is denied. Call your [57] witness.

LEO H. ROGNLIE

a witness called in behalf of Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pihl:

Q. Would you state your full name, please?

A. Leo H. Rognlie.

Q. Where are you employed, Mr. Rognlie?

A. At the present time I am working for the Benefit Order of America.

Q. Is that an insurance company?

A. Well, partially insurance, and it is a benefit company.

Q. Were you employed by Equitable Life and Casualty Company? A. Yes.

Q. When were you employed by that company?

A. I started in in October, 1955.

Q. Do you recall the exact date in October?

A. No, I do not.

Q. What department were you employed in in the company?

A. Oh, I started in the hospitalization first.

Q. You sold, I take it, health and accident policies? A. Yes.

Q. Did you go through a training period?

A. Yes, I did.

Q. About what time in 1955 would you say it was when you first [58] went out and began to contact people for sales?

A. Oh, I imagine it must have been about a week after I had got in the Hospitalization Department.

(Testimony of Leo H. Rognlie.)

Q. Would you say that was still in October, 1955? A. Yes.

Q. Did you have an opportunity to contact the plaintiff, Dr. Lee, while working for Equitable?

A. Yes, I did.

Q. When was that?

A. It was either the latter part of December or first part of January. I don't know the exact time.

Q. Would you say it was some time roughly in December, 1955, that you contacted Dr. Lee?

A. Yes.

The Court: That is not what he said. He said it was either in December or January.

Q. (By Mr. Pihl): Do you recall?

A. No, I don't remember the exact date. It was either the latter part of the year or the first part of the new year.

Q. What was the occasion of that call?

A. Well, we were working on telephone leads on hospitalization, and one of the leads that I had from one of the girls was to call Dr. Lee's office or come by and explain our hospitalization policy at the time.

Q. Do you know how you get these leads? Does the party call [59] in to the company?

A. No, the girls call the people on the phone.

Q. Dr. Lee evidently said he wanted to talk to an agent? A. Yes.

Q. You went up to his office? A. I did.

Q. Was anyone with you?

A. I was all alone.

(Testimony of Leo H. Rognlie.)

Q. Was there anyone with the doctor when you talked to him? A. No.

Q. What was the gist of this conversation?

A. Well, the main talk was just in regards to hospitalization first, and, as I was sitting there talking with him, he was not interested in something of that type at that time, but he was interested in an investment policy of some kind.

Q. Was there any discussion of this investment policy?

A. Yes, I discussed what little I knew about the policy at the time with Dr. Lee, and I told him, naturally, I would have to bring somebody from the main office, which was on Burnside, to talk to him about it because I didn't know all the details.

Q. What did you tell him at that time about this policy?

A. I just told him it was a profit-sharing program the Equitable had, that they had on the market, and, naturally, it was only going to be a certain amount of it sold.

Q. Did you discuss any figures with him at this time? [60] A. No.

Q. What was the next occasion you had to visit Dr. Lee in time from this first visit—about how long was it later?

A. Oh, I don't know; maybe a week or ten days after that I seen him again.

Q. Now, you say you saw him? A. Yes.

Q. Was there anyone with you?

A. Not at that time, no.

(Testimony of Leo H. Rognlie.)

Q. Where did you meet him?

A. In his office.

Q. What did you discuss on this second meeting?

A. I discussed the profit-sharing program, what little I knew about it, said that I wanted to set up a definite appointment with him to bring Mr. Myers up.

Q. You say you discussed this profit-sharing plan again. Now, what did you tell him on this occasion about this policy?

A. Well, very little, because, naturally, I wasn't very well acquainted with it at the time.

Q. Did you discuss any figures relating to dividends? A. No.

Q. What was the next occasion that you saw Dr. Lee?

A. A week or ten days after that I seen him again with Mr. Reed Myers at the time.

Q. Where was this meeting? [61]

A. In Dr. Lee's office.

Q. Would you relate to the Court what took place at this meeting in Dr. Lee's office with you, Mr. Myers and Dr. Lee? Was he alone, Dr. Lee?

A. Yes.

Q. What took place in this meeting with you three?

A. I introduced Mr. Reed Myers to Dr. Lee in his office, and at the time Dr. Lee had been checking the company in regards to its financial standing, and so on, as he related to me, and then Mr. Myers

(Testimony of Leo H. Rognlie.)

took out the book that we used or that was used at that time.

Q. What book was that?

A. Well, it was a book showing different stocks and different insurance companies, what they had done in the past.

Q. Is that this Hidden Ways to Wealth that has been introduced in evidence?

A. Well, no, it was a separate book. The Hidden Ways to Wealth—it was discussed at the time——

The Court: What was this other sheet? Is it a sheet showing how much these companies made in the sale of their stock, how their stock has gone up from $100 to $1,000 in a certain number of years?

The Witness: Yes, sir.

The Court: It is The Phenomenal Growth of Life Insurance Stocks? [62]

The Witness: Yes, sir.

The Court: Is that document here? Is that one of the exhibits here?

The Witness: I don't see any.

The Court: Wasn't that one of those sheets we had here?

Mr. Bowles: I believe it is Plaintiff's Exhibit 5.

The Court: Have you got No. 5, that green one?

Mr. Bowles: No, that is 4.

Mr. Pihl: No. 5 is a booklet.

The Court: No. 5 is the Hidden Ways to Wealth.

Mr. Pihl: That's right.

The Court: That is not the one he was talking about. In other words, he showed him a little

(Testimony of Leo H. Rognlie.)

pamphlet or a booklet which told of the phenomenal growth and the value of life insurance stocks?

The Witness: Stocks, and also what had been done in profit-sharing by other companies in the past.

The Court: Profit-sharing of what kind?

The Witness: Supposed to be the same type of policy that he was sold.

The Court: Then what happened?

The Witness: Well, then, through the course of conversation and in looking over these different things that we had there, plus the policy——

The Court: Was the policy there showed to him? [63]

The Witness: A specimen policy was shown, yes.

The Court: What did he say about the specimen policy?

The Witness: Well, to him it looked very good.

The Court: To whom?

The Witness: To Dr. Lee.

The Court: To the man that was with you?

The Witness: Dr. Lee.

Q. (By Mr. Pihl): Was this other book, Dun's Reports?

A. Well, it was Dun's Reports. Well, there was ratings of other companies in those like Boston Mutual who had had a profit-sharing policy that paid out six or seven, eight, nine years. Not all of them were alike, and then either at the end of that meeting or the next one—I am not positive, but I think it was at that time that Dr. Lee signed an applica-

(Testimony of Leo H. Rognlie.)

tion, made an application for this profit-sharing policy.

Q. Did Dr. Lee have any information at his disposal that you observed while in his office?

A. Well, all I could see, he had some figures, and he also told me that he had checked with the bankers and the stockbrokers, and I don't know who else, in regards to our company and the opportunity it would give him not only as an investment but also insurance with it.

Q. So he told you that he had investigated the company? A. Yes.

Q. You believe that it was at this meeting that the doctor [64] signed the application?

A. As near as I could recall, yes.

Q. At any time prior to the signing of this application, was Mr. Reklau ever at a meeting with you and Dr. Lee? A. Not prior, no.

Q. When was the first time to your knowledge that Mr. Reklau and Dr. Lee met?

A. Well, I am not sure about the time he had moved, a month, two months, even three months after the sale had been made before Dr. Lee had a chance to meet Mr. Reklau for the first time.

Q. How do you know this?

A. Because I was the one that introduced him to Dr. Lee.

Q. Where did you introduce Mr. Reklau to Dr. Lee? A. In Dr. Lee's office.

Q. You know that it was subsequent or after the signing of this application?

(Testimony of Leo H. Rognlie.)

A. To the best of my memory, yes.

Mr. Pihl: Your Honor, might I have that long schedule?

(Document presented to Counsel.)

Q. Would you hand that to the witness, please. I ask you to look at Plaintiff's Exhibit No. 6, Mr. Rognlie? A. Yes.

Q. Have you ever seen that schedule of figures before? A. Yes.

Q. When did you first come into contact with that schedule? [65]

A. Oh, some time in the early part of 1956; I don't know, maybe April, May, something like that.

Q. You say about April or May of 1956?

A. April or May, because it had nothing else here. When Mr. Reklau handed it out to the different salesmen it was only a recommendation at the time to the effect that if the company could set it up and put so much dividends in the stock pool this is what it would earn.

The Court: Will you state that again: If the company would put it up in a stock pool?

The Witness: No, at the time we were instructed what they were trying to do in Salt Lake City would be to create what they called a stock pool there whereby you could use the dividends from the profit-sharing policy, a certain percentage of your dividends which would be put in the stock pool, and in the like manner of the records with those insurance stocks, which insurance companies generally buy

(Testimony of Leo H. Rognlie.)

from each other occasionally, pay that amount of dividend even if it started at $10 the first year and each year went up, it would pay off in like manner as instructed in this projection.

Q. (By Mr. Pihl): So that related to a stock pool rather than this 20-pay-life policy?

A. That is right.

Q. To your knowledge, or in your presence, was that schedule ever shown Dr. Lee? [66]

A. Not that I know of, no.

Q. Did you have occasion to see Dr. Lee after the issuance of this policy?

A. Yes, a number of times.

Q. What was the gist of the conversations of these meetings?

A. Oh, he occasionally asked me how things were coming and how business was increasing because the main issue at that time they were selling in the State of Oregon was profit-sharing, 20-pay-life policies.

Q. Did you sell other policies, though?

A. We had other types of policies. Not all of them were licensed in the state yet.

Q. Go on about these meetings with Dr. Lee.

A. That's about the only thing that was discussed most times, was how was things and, I mean his, oh, he was interested naturally in seeing what the company was doing, and, naturally, we all assumed at the time, even I think the salesmen that were working, that periodically or, you might say, every year after the Board of Directors met and decreed whatever the dividend was going to be that

(Testimony of Leo H. Rognlie.)

each profit-sharing holder would be getting a notification of that fact, and that went on, oh, I don't remember, until I guess it was in the summer when I discussed with him in his office——

The Court: Discussed with whom?

The Witness: Dr. Lee in regards to another——

The Court: What summer?

The Witness: It was of 1956—in regards to a profit-sharing program for his son, and he told me at the time that he would be interested because the boy had some money in savings and may as well get in on something like this profit-sharing which would pay him more dividends than what the bank was paying him on savings. So at that time I brought Mr. Reklau up there with me and introduced him to Dr. Lee, and an application was made out for his son for the same amount premium-wise as Dr. Lee's.

Q. (By Mr. Pihl): You personally introduced Dr. Lee to Mr. Reklau?

A. As close as I can recall, yes.

Q. In the summer of 1956? A. Yes.

Q. Were you present when Mr. Myers was explaining the dividends to Dr. Lee in his office prior to the purchase of this policy in question?

A. I was.

Q. Did you explain—was it explained to him in your presence when the first dividend would be due?

A. Yes.

Q. When was the first dividend due?

A. At the end of the second year.

(Testimony of Leo H. Rognlie.)

Q. So, in other words, the first dividend would be due two [68] years from the time you were talking to him, roughly?

A. Well, the way it was explained to us by Mr. Reklau, that their first dividend would be due then at the end of the second year or within 90 days of the time they had paid their third one.

Q. So, in other words, you were talking about a period of about two years, two years and 90 days in advance? A. Yes.

Q. Did Mr. Myers explain to Dr. Lee where these dividends came from? A. Yes.

Q. What did he say to Dr. Lee in this regard?

A. Well, on the face of the profit-sharing 20-pay-life policy, which is boxed in, it shows the different parts of the insurance company and where they make their money, and anybody that was a profit-sharing policyholder would share in these different parts of the company where they received their profits from.

Q. Was any figure mentioned to Dr. Lee in regard to the dividends?

A. On the figures at that time, the one I remember was a 10 per cent dividend that had been already decreed by the Board of Directors.

Q. For the policy year 1955; would that be correct?

A. No, it would be for all the profit-sharing holders that had been in long enough to share in in 1956. It was a 1956 Board of [69] Directors in the decree.

Q. Would that figure affect Dr. Lee's policy?

(Testimony of Leo H. Rognlie.)

A. No, not at that time.

Q. Because he had to hold it two years, you said, to get the dividend? A. That is right.

Q. Was any other figure mentioned to Dr. Lee that you can recall?

A. Only in regard to other companies that had profit-sharing policies in the past. Some of them had paid ten, fifteen, twenty per cent. Some of them had gone over a hundred per cent or more even. Naturally, it was explained there was no way of knowing how high the dividends would go.

The Court: Did you tell him that this was a highly speculative deal and that he had to go in with his eyes open?

The Witness: It was explained to him at the time that, to begin with, it was an investment policy, and, secondly, it was insurance.

The Court: Primarily an investment policy?

The Witness: Yes.

The Court: Did you explain to him that the only policies that were authorized in the State of Oregon were these profit-sharing policies and that everybody in the State of Oregon who bought a policy would be entitled to have the guarantee, too?

A. No. [70]

The Court: You knew that, though, didn't you?

The Wtiness: No, I didn't.

The Court: Didn't you know that the only policy that was authorized in Oregon was this life policy, was the profit-sharing policy?

The Witness: No, at the time I didn't know that

(Testimony of Leo H. Rognlie.)

this was the main one that was licensed because I was new in the insurance business, only had been in a few months.

Q. (By Mr. Pihl): You were in the Health Department before at that time that this was sold?

A. Yes.

Q. Then you later transferred to the 20-pay-life?

A. When they closed up the Hospitalization Department in either January, the first part of February, I transferred then.

The Court: So you were not aware of the fact that since 1953 they had been selling these policies and that was the only authorized policy in Oregon?

The Witness: No, I didn't.

The Court: That is why you made a representation to him that naturally only a limited number of policies would be sold?

The Witness: That is what I was instructed.

Q. (By Mr. Pihl): Do you know how many policies were sold in the state?

A. No, I have no way of positively knowing. I know approximately there should be about 500, but a lot of them was broken-up [71] units.

Q. Were you instructed by the company to contact certain individuals?

A. Yes, we were instructed by Mr. Reklau at the time in our training to contact business people, or, you might say, people in just about every line of work because they represented under this profit-sharing program to have radiation for future business of other types of insurance.

(Testimony of Leo H. Rognlie.)

Q. Was it explained to you a limited number of policies were sold to certain individuals?

A. Yes, they had a chart in the office which showed how many were allotted to each county in the state according to a per capita basis.

Q. So they were actually limited?

A. Yes.

Q. Was there some kind of a program going on in the company at this time? Do you recall the instructions?

A. I don't understand what you have said.

Q. Was there some kind of a selling program going on in the company at this time?

A. Yes, we had. At times different prizes were set up, those that got the most volume of business and the most premiums, and different setups like that.

The Court: What commission did they pay on first-year premiums? [72]

The Witness: I was paid 50 per cent and nine and fives after that.

The Court: How much for renewals?

The Witness: Five per cent.

Mr. Pihl: I have no further questions, your Honor.

(Testimony of Leo H. Rognlie.)

Cross-Examination

By Mr. Bowles:

Q. To clarify one thing, Mr. Rognlie, when the policy was delivered your first-premium payment was due; was that the way it was handled?

A. Yes.

The Court: Yes, that is the way it is always handled.

Q. (By Mr. Bowles): But this dividend was not due until the time the third premium was due; is that correct? That would be at the end of your second year?

A. End of your second year; that's right.

The Court: You say you started to work for the company in about September or October of 1956?

The Witness: 1955.

The Court: 1955, and you contacted Dr. Lee several weeks after that?

The Witness: Yes, sir.

The Court: That was the first time you contacted him, and you contacted him with reference to an health and accident [73] policy?

The Witness: Yes, sir.

The Court: He told me he was not interested in the health and accident policy, but he was interested in an investment, and it was at that time that you talked to him about this profit-sharing policy, even though you yourself had very limited information concerning it?

(Testimony of Leo H. Rognlie.)

The Witness: That's right, sir.

The Court: Proceed, Mr. Bowles.

Q. (By Mr. Bowles): You say he went to work in October of 1955 for Equitable Life and Casualty Insurance Company? A. Yes, sir.

Q. How long were you employed by that company?

A. Until the 2nd of April, this year.

Q. In other words, you have just recently left them? A. Yes, sir.

Q. You only now are testifying from memory as to when you went to work for them. Haven't you any way of fixing that date?

A. The only way I would have an accurate check on it would be according to my license, and, as far as I remember, I got my first license in October, the first part of October, 1955.

Mr. Bowles: That is all.

Mr. Pihl: No questions.

The Court: That is all.

(Witness excused.) [74]

OSBURN R. MYERS

a witness produced in behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Holman:

Q. Mr. Myers, where do you live?

A. 2010 Southeast Tenino, Portland, Oregon.

(Testimony of Osburn R. Myers.)

Q. By whom are you presently employed?

A. Well, I am associated with Bankers Union, but I don't know whether my license has been renewed this year with Equitable or not. I have not been informed. It probably has.

Q. What is your capacity with Bankers Union?

A. Special agent.

Q. What type of insurance are you selling for Bankers Union? A. Profit-sharing contracts.

Q. Profit-sharing contracts? When did you first go to work for Equitable Life and Casualty Company?

A. Approximately, that would be in June, 1955—or 1954, I believe. I am trying to remember when Mr. Reklau's office was over in the Loyalty Building. I believe it was in 1954.

Q. June of 1954? A. Yes.

Q. What type of policy were you selling?

A. At that time this individual profit-sharing contract that we are discussing here was just approved by your Insurance [75] Commissioner of this state. It was shown to me then, that they were interested in promoting it here, and it wasn't until that fall that I was able to start working with it, at the end of 1954.

Q. In the fall of 1954 the policy was approved, and you started working with it?

A. That's right.

Q. Was that your primary selling job, to sell a profit-sharing policy for the company?

(Testimony of Osburn R. Myers.)

A. Right.

Q. When was your first contact with the plaintiff in this case?

A. That was December of 1955.

Q. How was this first contact made?

A. Well, I have to go back a little ways in this respect, but in 1955, the summer of 1955, the Equitable Life and Casualty was interested in putting more premiums on the books than we were getting in the profit-sharing contracts, and, as such, we opened up the hospitalization program. That hospitalization program started approximately the first of November of 1955, and Mr. Rognlie then—well, around the 25th of October is when he came to work, I believe, and the 1st of November we were ready to go, and it was Mr. Rognlie who contacted Dr. Lee the first part of December, as he mentioned before, relative to an A & H program. [76]

Q. Then Mr. Rognlie took you to Dr. Lee for the first appointment in the latter part of December, 1955?

A. I would say it was about the middle of December.

Q. Middle of December, 1955?

A. Yes.

Q. Can you relate somewhat of your discussion with Dr. Lee concerning this policy?

A. Yes. When I went up there with Mr. Rognlie, why, Dr. Lee had his office free of patients. We discussed this profit-sharing program and that the profit-sharing contract as put out by Equitable

(Testimony of Osburn R. Myers.)

is based on the experience of other companies which have profit-sharing contracts, you see, every insurance company of any type at some time or another, in order to expand, had to place out in a specific area a certain number of these profit-sharing contracts. The purpose of these profit-sharing contracts was to go ahead and to place them with people of influence in a community so that our men that are selling regular, ordinary types of insurance, when they are selling that in that community we use these names as reference, use them as a referral so that we can sell our other types of insurance. That was explained also.

Q. To interrupt you for a minute, was this primarily to gain capital for the company, these profit-sharing policies?

Mr. Bowles: I object to that question, your Honor, because this man was only a salesman—— [77]

The Court: Objection overruled. Did you tell Dr. Lee that they wanted to gain capital for the company?

The Witness: No, sir; nothing to do with capital, sir.

The Court: Very well.

Q. (By Mr. Holman): Well, now, talking with Dr. Lee, did he ask you certain questions concerning the dividends feature of the contract?

A. Yes.

Q. Did you explain those features to him?

A. I did to the best of my ability, and Dr. Lee

(Testimony of Osburn R. Myers.)

was, to my knowledge, one of the best informed of any I have talked to. His questions were very intelligent and very direct, and I answered them in that manner.

Q. Well, now, was this at the first meeting you had with him? A. That's right.

Q. What information did he have at that time concerning the company and your policy?

A. Well, I don't believe at that time he had very much information because he said he wanted to think about it. I explained the program to him in the respect that where the profits come from, they come from mortality savings and the refunds and interest earned, and that's what constitutes the profit-sharing contract based on the ordinary 20-pay-life insurance program.

Q. Did you at this time explain to him that he was not buying stock in the company; that it was a profit-sharing contract? [78]

A. Well, I was positive he understood that. No mention of stock was made.

The Court: Why, then, did you give him that book, Hidden Ways to Wealth?

The Witness: That was given to me by Mr. Reklau, which was to be given to every prospective client.

The Court: Page 50 says,

"Let's start with Life Insurance Company of Virginia. This company organized in 1871. It took until 1917 to reach its total paid-in capital of $800,000. As of December 31, 1957, it has paid dividends

(Testimony of Osburn R. Myers.)

in cash of $31,000,000-plus, and in stock of $11,200,-000. On the contract mentioned, a rough evaluation of what we find mentioned above, each thousand dollars in original paid-in capital is estimated to be worth $80,598 and has received $38,984 in cash dividends. From here it looks more like $119,000 from an investment of only $1,000."

If he was not buying stock, why did you give him this book?

The Witness: The reason for that, your Honor, is this: Everyone that went ahead and was interested in profit-sharing contracts also had something definite in their mind as to payout and whether they would lose their money entirely, buying an insurance policy, and if I could show you the part I showed in [79] the book, is right here, and I only wish to quote one individual. Thomas Blackburn is one of the best authorities of legal life insurance people. Blackburn says on life insurance:

"In the bright lexicon of legal reserve life insurance there is no such word as failure."

My opinion was certainly that they couldn't lose their money.

The Court: Did you also tell them how much they could make?

The Witness: I told them no company can guarantee profits. They did expect to pay 10 per cent dividend to start with.

The Court: What about 11.9 per cent in his age bracket?

(Testimony of Osburn R. Myers.)

The Witness: I am not too familiar with that, sir. That was after my time.

The Court: You never heard of that?

The Witness: I heard of it afterwards, sir.

The Court: That was after your time?

The Witness: Well, after this sale is what I am referring to.

The Court: How long after the sale?

The Witness: Well, I thought that was bought out by Mr. Reklau—some time in March or April.

The Court: Of what year?

The Witness: 1956.

The Court: Well, actually, you were with the company for several years during which they were talking about this 11.9, [80] were you not?

The Witness: No, sir; they weren't—that 11.9, to the best of my knowledge, would be in respect to cash value, which this policy would automatically earn.

The Court: Is that what it says?

The Witness: I don't know whether it says it, but that is what I understand it.

The Court: It was not additional income?

The Witness: It would be additional 10 per cent, yes, it would in cash value that your policy pays, would be in addition to the dividend which is paid the individual.

The Court: When you went out to sell this policy, you knew the premium was quite high for what a man was getting, wasn't it?

(Testimony of Osburn R. Myers.)

The Witness: No, sir; it was not. That premium was based on a 20-pay-life policy irregardless of what type of contract you bought. Any company on a 20-pay-life program, the premium would be the same and fluctuate within two or three dollars.

The Court: You mean $16,000 would be the amount?

The Witness: I think Dr. Lee's age was 53.

The Court: About 52.

The Witness: Well, that makes around $62 a thousand.

The Court: You think that is a fairly good premium?

The Witness: That is a standard policy, your Honor, all [81] companies have had, unless you go into ordinary life or you go into term, but if you go into 20-pay-life the payments would be higher.

The Court: You put in $20,000, and they pay you back only $16,000?

The Witness: Yes, but, by the same token, if Dr. Lee had had it just a day after he signed the application, if he passed away, his beneficiary would have received $16,000.

The Court: There is an insurance with it, too. You do not happen to know what the Bar Association is giving for $10,000, $100 for $10,000?

The Witness: That's right; I think you will find that's mostly on a term basis for ordinary life, too.

The Court: Proceed.

Q. (By Mr. Holman): This was the first meeting that you had with Dr. Lee. We are talking

(Testimony of Osburn R. Myers.)

about the first meeting you had with Dr. Lee in which Mr. Rognlie brought you and introduced you to him, and you talked to him about the policy in general, and then he wanted you to come back again after he had thought about it and perhaps checked on the company; is that right?

A. That's right; he said he would let us know.

Q. Did he call you back again?

A. No, I believe Mr. Rognlie contacted him after the first—it was right around Christmas time, and he didn't want to be bothered with it and give him ample opportunity to look into it, [82] and it was some time after, approximately the 15th of January, I believe it was, that Mr. Rognlie had contacted Dr. Lee.

Q. Did you go with Mr. Rognlie again to see Dr. Lee?

A. Yes. That was on the 20th of January, 1956.

Q. Is that when he filled out the application?

A. That's right.

Q. So you only had two visits then with Dr. Lee? A. That's right.

Q. Mr. Rognlie had perhaps three or four?

A. Well, Mr. Rognlie, I think, delivered the policy, and I think that one reason Mr. Rognlie was up there to see Dr. Lee was Dr. Lee was fixing his teeth, as I understood it.

Q. Did Mr. Reklau ever go with you at any time to see Dr. Lee?

A. Not with me. To the best of my knowledge, the only time that Mr. Reklau would have been to

(Testimony of Osburn R. Myers.)

see Dr. Lee, I believe, was as Mr. Rognlie said—I am not familiar exactly when, but I am positive that Dr. Lee had never met Mr. Reklau prior to our sale of the contract.

Q. Well, now, did you have anything to do with the sale of the policy to Dr. Lee's son?

A. Beg your pardon?

Q. Did you have anything to do with the sale of the policy for Dr. Lee's son? A. No, sir.

Q. You did not handle that sale? [83]

A. No, sir.

Q. This second meeting in which Dr. Lee signed up for the insurance, what representations did you make to him concerning the possible dividends that would be paid in the future by the company?

A. Well, all I remember is when I went in there Dr. Lee came out with "Best's Reports," which is what we call the Bible of the insurance industry. It gives an entire breakdown of every insurance company in the business, at present over 1,200 of them, and he had the information, and he said his investigation bore out the fact that it was probably all right, but he was suspicious of it because here is an organization that had only two or three million dollars on the books. That's the reason these contracts were being placed, to get more business, and as the company grew he would share in the profit proportionally. That is exactly what I told him.

Q. Was the understanding on your part that there would be only a very limited number of profit-sharing policies sold?

(Testimony of Osburn R. Myers.)

A. Yes, sir; I believe that.

The Court: What did you say?

The Witness: Yes, sir.

The Court: The only policies that you sold were profit-sharing policies?

The Witness: That's right.

The Court: That is the only policy you are selling now? [84]

The Witness: For Bankers Union, yes.

The Court: How about Equitable?

The Witness: They are not writing this any more. They are writing A & H, ordinary life.

The Court: They stopped these profit-sharing contracts?

The Witness: Yes; after receiving a certain amount of them, they stopped writing them, I think it was in September or November, 1957. You see, Judge, there couldn't be any profit if everybody had the profit-sharing contract. There has to be other business.

The Court: It is quite obvious to me.

The Witness: That's right.

Q. (By Mr. Holman): Can you clarify this business about that 8 per cent dividend and the 10 per cent dividend? When was that mentioned and in what meeting?

A. I don't know where the 8 per cent come from. I only know that I was informed by Mr. Reklau. You want to understand that Mr. Reklau was the General Agent for the company, and every Monday there were sales meetings, and at these sales meet-

(Testimony of Osburn R. Myers.)

ings the agents were informed what we should tell our clients in the process of selling an annuity, which in this case was a profit-sharing contract, and I don't recall anything about an 8 per cent. He said that he was informed by the main office in Salt Lake City that the first dividend would be no less than 10 per cent, and as time went on the dividends would be more, and that's exactly [85] what was stated.

The Court: Would the dividends be accumulative?

The Witness: Well, the dividends would be another matter. There is two ways of looking at cumulative business, which if they left them with the company one would be on top of the other, and that they draw interest on top. That's all it amounted to, but you can't have your cake and eat it, too. If you take your dividend, it has got to take twenty years to pay out. If you left the dividend to accumulate in the company, it would pay out in a much shorter length of time.

The Court: In other words, there was not the same amount of dividend each year. The more you paid in, the more dividend you got?

The Witness: No, sir; it was issued as a straight 10 per cent dividend. My understanding was that as the business would increase and the profits would be more, the profit-sharing contracts would receive more dividend, that dividend to increase each year, yes.

(Testimony of Osburn R. Myers.)

The Court: Take a look at that schedule, the yellow one. For what was that used?

The Witness: I beg your pardon?

The Court: Did you ever use that?

The Witness: No, sir.

The Court: You never sold from that?

The Witness: No; no, sir. [86]

The Court: You never heard of that?

The Witness: Oh, yes; I have heard of it.

The Court: You have seen it?

The Witness: Yes.

The Court: But you never used it?

The Witness: No, sir.

The Court: Why not?

The Witness: It is an impossibility, that is the first reason; secondly, I don't have to lie to sell my business. This thing here was placed out by Mr. Reklau to all the men in the office some time around March or May of 1956, and I told him at the beginning that that was something that should not be used, that that did not relate to what we were doing, but Dr. Lee's information in regard to this thing was through his personal contacts with Mr. Reklau after he had bought his first policy. Of that I am positive.

Q. (By Mr. Holman): Well, now, concerning these dividends, did you explain to Dr. Lee that they were to be anticipated in the future when he would receive them?

A. That's right; no company can guarantee its profits and results. They couldn't guarantee any

(Testimony of Osburn R. Myers.)

type of dividend. No company can, but that they were starting with a minimum of 10 per cent, and as the business grew the dividend could increase, become larger.

Q. So you showed him this material on other companies? [87]

A. Well, that material that was shown, as I mentioned, every company at some time or other had issued profit-sharing contracts to get established in the state, to create their centers of influence, and, as such, we used these as a comparison to show based on the experience of other companies exactly what they done and what we would expect to do proportionately.

The Court: Are there any further questions?

Mr. Holman: No further questions.

Cross-Examination

By Mr. Bowles:

Q. Mr. Myers, isn't it a fact that these policies were sold as a unit or a part of a unit?

A. Yes, sir.

Q. In other words, you could have a unit that paid a thousand dollars premium annually?

A. That's right.

Q. And it didn't make any difference whether you started at age 5 or age 65, it still paid a thousand dollars premium, didn't it?

A. Yes; that would be based on the age.

Q. So the age bracket didn't make a bit of difference?

(Testimony of Osburn R. Myers.)

A. Oh, yes; it determined the amount of insurance you were going to get.

Q. Yes, but as to the premium it didn't make a bit of difference, [88] did it? A. No.

Q. Were you ever present at any of the meetings at which Mr. Ray Ross attended these sales meetings?

A. No, sir; I wasn't, unfortunately. I would have liked to have been there.

Q. His attendance upon this meeting was prior to the time you came into the organization?

A. I didn't quite understand you.

The Court: No; he was there long after he left. Mr. Ross came to Portland long after you had been with the company, didn't he?

The Witness: No; he came to Portland frequently while I was with the company, but most of those were not from the standpoint of meetings. They were just talks with Mr. Reklau. Mr. Reklau was General Agent, and he would talk to Mr. Reklau about matters and took most of the boys out for supper.

The Court: But there would be times when he talked to the boys, the agents, and you were not there?

The Witness: Well, I was there once, but I didn't go to all of them.

Q. (By Mr. Bowles): Did you overhear him make any statement that this policy would be self-sustaining in four years' time? A. No, sir.

Mr. Bowles: That's all. [89]

(Testimony of Osburn R. Myers.)

Mr. Holman: One more question, your Honor, if I may.

The Court: Proceed.

Redirect Examination

By Mr. Holman:

Q. Later on were you made General Agent for the company here in Portland? A. Yes.

Q. When was that?

A. There was three of us made General Agents about, I would say that was in the first part of 1957, spring of '57.

Q. You held that job until you left the company?

A. Oh, I haven't left them yet. I just don't know whether my license has been renewed.

Q. That's all; thank you.

The Court: Does the defendant rest?

Mr. Pihl: No, your Honor; we would like to introduce this exhibit.

The Court: Have you another live witness?

Mr. Pihl: Yes.

Mr. Holman: We have one more witness, your Honor.

The Court: Call him.

Mr. Holman: He is on a plane, your Honor. He will be here the first thing in the morning.

The Court: No; this case finishes today. Call your next [90] witness.

Mr. Holman: That is all we have. We have one more exhibit.

The Court: Very well.

Mr. Holman: We want to call Mr. Bowles, your Honor.

Mr. Bowles: My signature is on the letter. There is no question about it.

Mr. Holman: We would like to introduce Exhibit No. 16, your Honor.

The Court: Very well.

(Thereupon, letter of January 19, 1959, to Equitable Life and Casualty Insurance Company, Salt Lake City, Utah, from Rollin E. Bowles, previously marked Defendant's Exhibit 16 for Identification, was thereupon received in evidence.)

The Court: Do you have any more witnesses?

Mr. Pihl: No, your Honor; other than Mr. Ross.

The Court: Where is Mr. Reklau?

Mr. Pihl: Mr. Reklau quit the company last year some time, your Honor, and to the best of our knowledge he is in the Midwest somewhere.

The Court: When did you hear that this case was going to be tried?

Mr. Pihl: Friday, about noon, when I found out, your Honor. [91]

The Court: Didn't you know that this case was set for trial this week?

Mr. Pihl: Yes, your Honor.

The Court: When did you find that out? Didn't I set this case a few months ago?

Mr. Pihl: No, your Honor. It was originally set for April 21st of this year. Mr. Bowles informed the Court by letter that he could not make it, and then the Court reset it for some time during the week. I believe the card read for trial during the week of April 13th. We found out it was today at 1:30 at about noon Friday. We checked with Salt Lake City, and we were informed——

The Court: I thought that this case had been set quite awhile ago. I am going to recess the trial until tomorrow morning to give Mr. Ross an opportunity to testify. We will recess until 9:30.

(Evening recess taken.) [92]

Morning Session

(Proceedings herein were resumed at 10:00 a.m. on April 14, 1959, pursuant to the evening recess, as follows:)

The Court: Mr. Pihl, you may proceed.

Mr. Pihl: I will call Mr. Ray Ross.

RAYMOND R. ROSS

a witness produced in behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pihl:

Q. You are Raymond Ross? A. Yes.

Q. What is your occupation, Mr. Ross?

A. I am Assistant General Manager, Superin-

(Testimony of Raymond R. Ross.)

tendent of Agents for the Equitable Life and Casualty Insurance Company of Salt Lake.

Q. That is the defendant in this case?

A. Yes.

Q. Do you know the plaintiff, Dr. Lee?

A. I do.

Q. When did you first meet Dr. Lee?

A. In October of 1957. [93]

Q. Where was this meeting?

A. In Dr. Lee's office.

Q. Here in Portland in the Weatherly Building?

A. I am not sure the name of the building, but it was here in Portland,

Q. Who introduced you to Dr. Lee?

A. I introduced myself to Dr. Lee.

Q. Was there anyone with you when you went up to this meeting? A. Yes.

Q. Who? A. Mr. Frank Wetzel.

Q. What was the occasion of this meeting with Dr. Lee in October, 1957?

A. It was in regard to some correspondence that we had had at that time.

Q. What was this correspondence?

A. He had several questions in regard to an insurance policy and also a $2,000 investment that he had made with Mr. Reklau.

Q. Would you explain these two items to the Court.

A. Well, yes, Dr. Lee had several questions in regard to a life insurance policy which he carried with this company, and some time before my call he

(Testimony of Raymond R. Ross.)

had given Mr. Reklau, if I recall correctly, $2,000 supposedly for stock, and he was concerned about it.

Q. Did you discuss this $2,000 transaction between Mr. Recklau [94] and Dr. Lee with Dr. Lee?

A. Yes.

Q. Would you give the Court the gist of this conversation?

A. Well, Dr. Lee was concerned because he apparently thought he was buying stock in the Equitable, and I suggested to Dr. Lee that he got a note from Mr. Reklau and an assignment of Mr. Reklau's commissions with my company as a guarantee that he would be repaid the $2,000.

Q. So you gathered from this conversation that Dr. Lee had loaned Mr. Reklau $2,000?

A. No, no, I don't believe he did loan it. I think Dr. Lee felt that it was to purchase stock.

Mr. Bowles: I am going to object, your Honor, to that kind of testimony. What he thought Dr. Lee thought is not important here.

The Court: That is right.

Mr. Bowles: It is what Dr. Lee said or what was actually done.

Q. (By Mr. Pihl): What did Dr. Lee say about this transaction?

The Court: Aren't we getting far afield? Is that the case we are trying now?

Mr. Bowles: It has nothing to do with this at all.

Mr. Pihl: No, your Honor, but he went up there for two purposes, I understand, to see Dr. Lee relating to Mr. Reklau.

(Testimony of Raymond R. Ross.)

The Court: Mr. Reklau apparently got $2,000 on a transaction [95] that has nothing to do with this case.

Mr. Pihl: Yes, your Honor.

The Court: Now, let's talk about the case.

Q. (By Mr. Pihl): What else, if anything, did you discuss with Dr. Lee in the October, 1957, meeting?

A. We discussed his policy, the dividend payable under the policy.

Q. What did you tell Dr. Lee about this policy and its dividends?

A. I told him that it was a profit-sharing policy, a participating policy. He asked me the question of what size dividend we were paying. I told him 10 per cent that year. He wanted to know whether or not his dividends would be based upon an accumulation of premiums in the years to come. I told him no.

Q. Was there anything else you told him about the dividends?

A. Yes, I told him that they could not be guaranteed; that it was impossible to guarantee earnings in the future.

Q. What did Dr. Lee say, if anything?

A. Well, he was quite disappointed. He told me that—after I had explained the policy in detail to him, he asked if there wasn't some way that—I beg your pardon, your Honor—that the $2,000 he had given Mr. Reklau could be applied for his next

(Testimony of Raymond R. Ross.)

year's premium that was due in January. I told him no, that it was a separate transaction entirely. Well, he made the statement, "Well," he says, "I have got three months to decide whether or not to make my next premium payment." [96]

Q. This was in October, 1957? A. Yes.

Mr. Pihl: Your Honor, could I see Plaintiff's Exhibit No. 6, please?

Q. Mr. Ross, would you please look at Plaintiff's Exhibit No. 6. Have you had an opportunity to review it?

A. Yes, I have seen this before.

Q. When did you first see that?

A. In Salem, Oregon, at a hearing in the Insurance Department.

Q. When was that?

A. During the summer of 1957.

Q. During the summer of 1957. Now, did Dr. Lee metion this projection schedule to you during your meeting of October, 1957?

A. No, sir; he did not.

Q. He made no remarks about it at all?

A. No, sir.

Q. Did you at any other time have a visit with Dr. Lee?

A. Yes, I visited again with Dr. Lee, I believe, in February of 1958.

Q. That would be approximately a month subsequent to the first dividend payment, would it not, in January of 1958? A. Approximately, yes.

(Testimony of Raymond R. Ross.)

Q. So it was after that? A. Yes.

Q. What was the gist of your conversation with Dr. Lee at this [97] meeting?

A. At this meeting we discussed more than anything else the $2,000.

Q. Were there any discussions about dividends relating to this 20-pay policy?

A. Not that I recall.

The Court: When was your first visit with Dr. Lee?

The Witness: In October of 1957.

The Court: That was before he made his next payment?

The Witness: Yes, sir.

The Court: You say he was primarily interested in the $2,000 at that time?

The Witness: He was interested in both, your Honor.

The Court: You told him at that time that there was only 10 per cent dividend?

The Witness: Yes, sir.

The Court: Proceed.

Q. (By Mr. Pihl): Did you at any time discuss with Dr. Lee when this policy in question would be paid up?

A. Yes, he asked me my opinion in regard to that. I explained to him at that time that most participating policies paid up in approximately 16 or 17 years, but because of the special features of this policy there was a good likelihood it could pay up in approximately 14 years.

(Testimony of Raymond R. Ross.)

Q. When was this discussed? [98]

A. This was in October, 1957.

Q. You say you told him at that time that the dividends were not cumulative on premiums paid?

A. Yes, sir.

Q. Have you ever had any other meetings with Dr. Lee other than the two you mentioned; October, 1957, and February, 1958?

A. No, I don't believe I did.

Q. When you received the third-year dividend in January approximately of 1958, was there a letter accompanying that dividend payment from Dr. Lee?

A. No, sir; not to my knowledge.

Q. To your knowledge, there was no letter accompanying that dividend payment?

A. That is correct.

The Court: Did you get a letter from him shortly thereafter asking about the dividends?

The Witness: No, sir; the letter in regard to the dividend came before my first meeting with Dr. Lee.

The Court: Where is that letter? Do you have a copy of that?

Mr. Pihl: No, I do not, your Honor.

Q. Mr. Ross, do you know a Neil D. Nadeau?

A. Yes.

Q. In what capacity did you know Mr. Nadeau?

A. He was a salesman with Mr. Reklau's agency. [99]

Q. Would you hand the witness Defendant's Exhibit No. 18. The Clerk has handed you Defend-

(Testimony of Raymond R. Ross.)

ant's Exhibit 18 for identification. Would you identify that document?

A. Yes, it's a general agent's contract with Neil Nadeau.

Q. With Equitable Life and Casualty?

A. With Equitable Life Insurance Company.

Q. When was that agreement signed?

A. It is dated April 30, 1957.

Q. April 30, 1957? A. Yes, sir.

Q. Is that when Mr. Nadeau went to work?

A. Apparently.

Q. For your company? A. Yes.

Mr. Pihl: We will offer that in evidence.

The Court: Who is Mr. Nadeau? Is he a partner of Mr. Reklau?

Mr. Pihl: No, your Honor, he is the witness who testified here yesterday relative to this projection sheet being handed to him in 1955.

Mr. Bowles: No, he didn't testify that that was done in 1955. I don't think this has any bearing on the case, this particular document.

The Court: The testimony so far has been that this projection sheet was first made available after Dr. Lee purchased the [100] policy, so I don't know what the purpose of this interrogation is.

Mr. Pihl: Your Honor, I believe that the record will show that Mr. Nadeau testified yesterday that he went to work for Equitable Life and Casualty Company shortly after they moved to 32nd and Burnside, and all the testimony was that they moved to 32nd and Burnside in either October or Novem-

(Testimony of Raymond R. Ross.)

ber of 1955, and this exhibit shows that Mr. Nadeau did not go to work for Equitable until April 30, 1957.

The Court: How does that show that?

Mr. Pihl: Because that is his employment contract, your Honor, with the company.

The Court: He might have been working for Mr. Reklau prior to that time.

Mr. Bowles: That is a technicality.

Mr. Pihl: I will ask Mr. Ross.

The Witness: May I answer that, your Honor?

The Court: Yes, proceed.

The Witness: The rule of the company is that no man can work for us unless he has first of all signed a contract, or represent this company in any way.

The Court: I don't think you are getting any place because you are just proving that which I am already convinced of. He is not suing for his son in this case. That is a different case, I presume. [101]

Mr. Bowles: That is a different case, your Honor; yes, sir.

The Witness: No, sir.

Q. (By Mr. Pihl): What was the circumstance——

The Court: Why are you going into that? What did he testify to that is of any consequence here?

Mr. Pihl: Since your Honor has ruled that this didn't come out until after the policy was issued, this would have no significance, your Honor.

The Court: You do not have to tell me about these insurance agents.

(Testimony of Raymond R. Ross.)

Mr. Pihl: I have no further questions.

Mr. Bowles: There is nothing that I care to cross-examine on.

The Court: That is all.

Mr. Pihl: Your Honor, could I ask one more question?

The Court: Yes.

Q. (By Mr. Pihl): Are you familiar with the standard insurance rates for 20-payment-life policies?

The Witness: I am.

Mr. Bowles: I am going to object to any question on that line. That isn't the matter at issue here.

Mr. Pihl: Your Honor, I think it is important that the Court know what the standard rates are that they charge. [102]

The Court: I will let it in.

Q. (By Mr. Pihl): What is the standard rate for an insured at age 52 for 20-payment-life per thousand dollars?

The Witness: Under the Commission Standard Ordinary Table of 1941 it is $62.21 a thousand.

Q. Did Equitable follow this rate? A. Yes.

The Court: Do all companies follow the same rate?

The Witness: No, sir.

The Court: Where did you say this rate came from?

The Witness: This is Commission Standard Ordinary Table of 1941 as used by New York Life at that time.

(Testimony of Raymond R. Ross.)

Q. (By Mr. Pihl): Did Equitable follow this New York Life Table? A. Yes.

Q. So the premium would be $62.21 per thousand? A. Yes.

Q. What is the premium in Dr. Lee's policy? Do you know?

A. If I recall correctly, that is his premium per thousand.

The Court: This profit-sharing policy, how many times did you sell this policy in Oregon?

A. In Oregon?

The Court: Yes.

A. I believe we started the sale of that policy, your Honor, in 1954, and I believe it was 1957 when we discontinued it. [103]

The Court: In how many states are you licensed to do business?

The Witness: Eleven states, your Honor.

The Court: What are they?

The Witness: Washington, Oregon, Idaho, Nevada, Wyoming, Colorado, New Mexico, Oklahoma and Hawaii. Have I left one out—Arizona.

The Court: Did you sell these profit-sharing policies in Washington?

The Witness: No, sir.

The Court: You never sold them?

The Witness: No, sir.

The Court: How about in Idaho?

The Witness: Yes, sir.

The Court: For how long?

(Testimony of Raymond R. Ross.)

The Witness: Oh, I don't recall, your Honor; a short period of time.

The Court: In other words, this policy was never approved in Washington?

The Witness: Oh, yes, sir; it is approved in Washington, your Honor.

The Court: But you never sold any?

The Witness: That is correct.

The Court: What kind of business do you sell in Washington?

The Witness: We are primarily selling accident and health [104] insurance in Washington, term insurance, preferred ordinary. They are the regular portfolio.

The Court: How about California?

The Witness: This policy is approved for sale in California. We have never sold it.

The Court: How about Wyoming?

The Witness: Wyoming, it is approved. It has not been sold.

The Court: Your company deals mainly in health and accident?

The Witness: Yes, at the present time primarily, your Honor. We are a combination company.

The Court: How about Colorado?

The Witness: Colorado, we have sold a policy similar to this over there, and this policy is also approved in Colorado.

The Court: New Mexico?

The Witness: New Mexico, it is approved. We have not sold down there.

(Testimony of Raymond R. Ross.)

The Court: Where is your home office—in Utah?

The Witness: Salt Lake City.

The Court: Do you sell in Utah, then?

The Witness: Oh, yes.

The Court: This policy, I suppose, is sold in Utah?

The Witness: No, sir; it is not.

The Court: It has never been sold in Utah? [105]

The Witness: No, sir; not to any extent.

The Court: How did you happen to sell that policy in Oregon, then?

The Witness: The reason we have not sold it in these other states, your Honor, has been a question of manpower. We had an agency up there or made a connection with Mr. Reklau and allowed him to sell that policy up here to establish the company.

The Court: How old is the company?

The Witness: The company became a stock company in 1947.

The Court: How much business did you do in 1957?

The Witness: In 1957?

The Court: Yes.

The Witness: Our premium income, it was a little better than a million and a quarter dollars.

The Court: How much business did you do in 1956?

The Witness: In 1956, approximately six hundred sixty thousand.

The Court: Of that amount how much was done in Oregon?

(Testimony of Raymond R. Ross.)

The Witness: Offhand I wouldn't know, your Honor, but considerable because we have had so many active agencies up here. I would say that the business from Oregon during the year 1958 was more than double or triple any other business we did in any other state.

The Court: What was it in 1956?

The Witness: '56? [106]

The Court: Yes.

The Witness: I would assume that perhaps our income was approximately $160,000 from Oregon.

The Court: You say you never saw Exhibit 6 with those figures?

The Witness: Not prior to the hearing at the Insurance Department in the summer of 1957.

The Court: Do you know who prepared those figures?

The Witness: I have learned since then that Mr. Reklau prepared them.

The Court: Have you ever seen that Exhibit 5 before?

The Witness: Yes.

The Court: At whose request were these documents distributed?

The Witness: At Mr. Reklau's request.

The Court: Did you know that he was having his agents sell by use of that?

The Witness: Yes.

The Court: That was approved by the company?

The Witness: Yes. May I explain that?

The Court: Yes.

(Testimony of Raymond R. Ross.)

The Witness: The individual profit-sharing policyholder receives dividends before the stockholders of any company. All this is is to show the true picture of what some companies in the insurance business have been able to do. Now, as a result [107] of my first statement which says that the policyholders receive their dividends before stockholders, as poof of that may I mention that up until 1957 this company had paid in excess of $350,000 to individual policyholders, dividend, and less than $82,000 to stockholders.

The Court: Up to 1947?

The Witness: 1957, your Honor.

The Court: What does that mean?

The Witness: It means that the policyholders share in the profits of the company before the stockholders.

The Court: In mutual companies they get all the money, don't they?

The Witness: Yes, sir; they do.

The Court: That is all.

Q. (By Mr. Pihl): Mr. Ross, would you examine Defendant's Exhibit No. 19 and identify that for the Court?

A. Yes, this is a dividend projection which was authorized for use by my company and was given to the boys to use to indicate what profits we expected to pay on that policy.

Q. Do you know who prepared that?

A. Yes, our actuary, Walter C. Green.

(Testimony of Raymond R. Ross.)

Mr. Pihl: We will offer that into evidence, your Honor.

The Court: Was that the one shown to Dr. Lee?

Mr. Pihl: That is the one approved by the company.

The Court: What difference would that [108] make?

Mr. Pihl: Your Honor, to show you what the actuary had determined would be the dividend under this policy.

Mr. Bowles: This was never shown to us.

The Court: Objection sustained.

Mr. Pihl: No further questions.

Mr. Bowles: I have no questions.

(Witness excused.) [109]

FRANK T. WETZEL

a witness produced in behalf of Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pihl:

Q. What is your occupation, Mr. Wetzel?

A. I am an attorney.

Q. Of what states are you a member of the Bar?

A. Utah.

Q. Where are you employed?

A. At the Equitable Life and Casualty Insurance Company.

Q. What is your position with the Equitable?

(Testimony of Frank T. Wetzel.)

A. I am General Counsel.

Q. Did you ever have any meetings with the plaintiff in this case?

A. I met him once in the fall of 1957 here in Portland.

Q. Who was at that meeting?

A. Dr. Lee, Mr. Ross and myself.

Q. Was that the meeting that Mr. Ross was referring to here on direct examination?

A. Yes, sir.

Q. You were present at that meeting. Would you tell the Court what was discussed at that meeting relating to dividend payments under this 20-pay policy?

A. Mr. Ross explained to Dr. Lee that the only dividend that [110] is authorized was the 10 per cent dividend—or 10 per cent annual premium; that it was 10 per cent of whatever the annual premium was, and payable on anniversary date.

Q. What else was discussed relating to dividends?

A. Relating to dividends? Oh, if you have any specific questions, I was only monitoring the——

Q. Did Dr. Lee have any questions?

The Court: I didn't hear what you were saying. What did you say?

The Witness: I wondered if he had more specific questions. I was monitoring the conversation. I don't think I said more than a half dozen words the whole time. My main interest was this $2,000, to see whether the company was involved in that or not.

(Testimony of Frank T. Wetzel.)

Q. (By Mr. Pihl): But you did hear a conversation between Dr. Lee and Mr. Ross relating to dividends? A. Yes.

Q. Did you hear anything said about accumulative dividends?

A. I think that was mentioned. Of course, it was made quite clear to Dr. Lee that it was not paid on an accumulative premium but only on an annual premium. This appeared to be at least disappointing, perhaps shocking, to Dr. Lee.

Q. What did Dr. Lee say, if anything?

A. Well, concerning the policy he said, well, he said he didn't know what he was going to do about it, but he had several [111] months to decide what to do about it. The premium was not due until the first of the year, which gave him probably three or four months to decide what he wanted to do.

Mr. Pihl: I have no further questions.

Cross-Examination

By Mr. Bowles:

Q. How long have you been General Counsel for this company, Mr. Wetzel?

A. I went to work for them in June of 1957, about June 21st.

Mr. Bowles: That's all.

Mr. Holman: Would your Honor be interested in more insurance rates from other companies concerning 20-pay policies at age 52?

The Court: No.

Mr. Holman: We have one insurance agent here who will testify about other policies in other companies.

The Court: No, I do not think I need that.

Mr. Holman: The premiums are very much the same, your Honor.

Mr. Pihl: The defendant rests, your Honor.

(Defendant rests.)

The Court: Is there any rebuttal?

Mr. Bowles: No, I don't think we have any rebuttal, your [112] Honor.

The Court: We will hear you.

Mr. Bowles: With respect to this matter, I think we have amply justified the complaint that we have alleged and the facts that we have set forth here from the testimony of Mr. Hust who was with the company when their offices or general offices were in the Loyalty Building. He testified there that Mr. Ray Ross at a meeting in those offices stated that if it were possible under the law for him to guarantee, that he would guarantee that this policy would pay itself out in four years.

Mr. Pruitt testified the same, and that testimony has not been controverted. It was Mr. Pruitt who testified that a list similar to what has been marked as Plaintiff's Exhibit 6 was in use by him at the time the offices were still in the Loyalty Building. It was testified to the same effect by Mr. Hust.

It is quite likely that some of these people who have testified for the defendant never saw this list

until after they went to work at the office on Burnside Street; that nonetheless these other people did. The list was before them.

It is quite true that Mr. Nadeau didn't testify that he went to work before Dr. Lee's policy was sold to him, and we make no claim for that. It is only through him that I was able to find this one list. They were never left. It was Mr. Reklau who showed that list and explained its meaning to Dr. Lee, from [113] whence he gathered his information.

The Court: You have no evidence that this list was ever shown to Dr. Lee prior to the time he bought the first policy?

Mr. Bowles: That was his testimony.

The Court: Well, I don't believe it. I think Dr. Lee is obviously mistaken.

There are two policies here. Every bit of testimony here from your own witnesses, every witness called other than Dr. Lee, pointed out that this list was shown after he bought the policy. You have one witness who stands alone against every witness for plaintiff and defendant on that point? Isn't that right?

Mr. Bowles: That is correct.

The Court: I do not say that he is deliberately falsifying, but I just say—this is more important in connection with the Bruce policy—that obviously this man is mistaken.

Mr. Bowles: On that matter, of course, there isn't, that is only—the statement, the Plaintiff's Exhibit 6, only backs up the Plaintiff's Exhibits 4

and 5, I think they are. It is this "Hidden Ways to Wealth" and "You Have Been Nominated." Both of them carry out the same general scope of explanation, and those were in general use by the company in their sales program and their sales agents and left an indelible impression that this is something more than a life insurance policy, and [114] most certainly it is not because the rate was at least high by the standards that we know in the Bar Association, and that is the situation. We feel that we have proved everything necessary to sustain the allegations of our complaint.

The Court: How do you account for the fact that there is a dispute as to the testimony as to when he had a conversation with Mr. Ross and this man who is the attorney for the company? It appears that he had this conversation some three months prior to the time that he made the payment.

Mr. Bowles: That was the last premium payment, your Honor.

The Court: Yes, that is right.

Mr. Bowles: I think it was Dr. Lee's testimony that it was in the summer of 1957 that he had a conversation—or the fall of 1957, as I recollect it.

The Court: Didn't he at that time know that the company was not going to come through?

Mr. Bowles: His testimony was the very same thing that Mr. Wetzel testified which was that the only dividends authorized at that time was 10 per cent, still holding out a possibility that further dividends would be paid, and no knowledge. He had no knowledge of what dividend, if any, they were

going to pay until such time as they made the payment of that dividend prior to his premium date in 1958.

The Court: We will hear from you.

Mr. Pihl: Your Honor, I think that the defendant by the [115] greater weight of the evidence has shown that only two men in Equitable contacted the doctor prior to the date that this policy was written. They were Mr. Rognlie and Mr. Myers. These three gentlemen were the only ones, including the doctor, were the only ones connected with the evidence of this policy, and that evidence is further shown that if there was some mistake in the mind of the doctor regarding the terms and conditions of profit-sharing, that these were fully explained to him in October, 1957, and it was not rebutted by the doctor; that he said, "Well, I have three months more to make up my mind whether or not I am going to continue this policy." Subsequent to that time he did make his third annual premium payment in affirmation of this contract.

I believe, like he states, that all the testimony here, as far as Mr. Reklau, goes to time and place subsequent to the issuance of this policy.

The Court: Yes, but I think it is quite clear that they made false statements to him at first. You do not deny it, do you?

Mr. Pihl: Your Honor, I do not think that they were false statements.

The Court: Here are two men who testified. They pointed out that they gave him this booklet,

"Hidden Ways to Wealth," and told him to get in on the ground floor because there was only a limited number of these policies. [116]

This is something more than puffing. These are deliberate misstatements. Perhaps not deliberate by the man who made them, but they were stimulated and the whole method of operation was of the same kind. For example, the fact that Mr. Reklau who was using this document at some time indicates that they were selling this policy by means of fraudulent representations.

It is a pretty thin reed upon which to rely to say that he made one payment subsequent to that time when Mr. Ross and another man, the general counsel, were monitoring the conversation. Dr. Lee, of course, was not a lawyer. He did not know what ratification means. He thinks he is a good businessman but looks at the wrong things when he went out to try to determine the soundness of a company. He was under the impression that he couldn't take any action unless and until he made the third payment. Under those circumstances, I am wondering whether as a matter of law he would be precluded from asserting original fraud or is he estopped from so doing under those circumstances.

Mr. Pihl: Your Honor, we have some points and authorities.

The Court: I will be glad to receive them.

Of course, what you say in Point No. 1 is true, that a certain amount of puffing is always admissible, but I am going to hold that the conversations went beyond mere puffing. I think the fact that

your agents used this document in selling insurance [117] is a badge of fraud, and I am going to hold that it was a fraudulent representation when they sold this policy because this man at that time indicated, and the testimony is clear from everybody, that when he was solicited for insurance he said, "I am not interested in insurance." That is what the agent said who called on him first, that Dr. Lee said, "I am not interested in insurance. I am interested in an investment."

This man says, "Oh, we have something for you. I don't know too much about it." The man said that, very frankly, he was going to find out about it for him.

This was a man who was not interested in some insurance. He was interested in making a lot of money. Usually those are the people who get hooked, but the representations that were made to him were that this is not of a speculative nature. I think that the remarks which were made subsequently are consistent with his understanding of the original conversation, and you cannot tell from looking at that policy that the statements are incorrect because when he looks at the policy and reads it in the light of statements that are made to him, he believes that this policy will do what he wants.

Now, what is your second point: "Dividend" is a widely known technical term and is related to problematical earnings and not absolutely to the payment of a fixed amount. That probably is true, but that has nothing to do with this case.

I am not impressed by the Anderegg case, that

by [118] retaining the policy for more than two years and by paying the premium, after being advised as to the payments, plaintiff waived misrepresentation and affirmed the contract.

The testimony is that the first time anyone told him that the dividend rate was 10 per cent and that was what was authorized was some three months before he made his last payment. At that time, they only told him what was in the policy; namely, that the Board of Directors would determine the dividend rate. He was under the impression, and he so testified, that until he made his third payment he had no right to any dividends. That was what was told him earlier.

The same applies to your next point, by paying a premium after receipt of the first dividend of $100 plaintiff has waived any misrepresentations made and he affirmed the contract. That is the same point as Point No. 3.

Mr. Pihl: Yes, it is, your Honor.

The Court: There is no difference between them.

When one who claims the right to rescind acts with reasonable promptness, and if after knowledge he does any substantial act which recognized that the contract is in force, such an act would usually constitute a waiver of his right to rescind. I think that is absolutely correct, but you must show that after he was acquainted with all the facts he made the election.

Mr. Holman: Your Honor, could I make a comment on that?

The Court: Yes. [119]

Mr. Holman: The first case, Herman vs. Mutual Life Insurance Company, involved a case in which the agent in the selling of the policy showed a columnar analysis to the prospective applicant, and this was in the nature of prospective earnings proposed on returns of other companies and that particular company.

Now, it so happened that the earnings did not measure up to the returns after the applicant was sold the policy. He came in to rescind the policy because the earnings did not measure up to what was represented to him, and the Court held that he had no right to rescind as all this was was a prophecy of what the future earnings might be in the company.

The Court: How much did they estimate the dividends would be?

Mr. Holman: I do not recall, your Honor. The policy there was in force for five years, and he received, I believe, three dividends which were short of what he expected to receive.

The Court: If a mutual life man tells me, "You can probably expect 10 per cent dividend or 15 per cent dividend," and the company pays 6 per cent dividend, that is one thing. If the testimony is that the dividends are going to be so high that after the fourth year it is very unlikely that you are going to have to pay any more premiums and that the amounts which you will receive go up into astronomical figures, and then the dividend is only 10 per cent, that is a little [120] different picture.

Mr. Holman: Well, your Honor, I think the

plaintiff in this case after consulting his broker and the Insurance Commissioner and the other people and being advised that this just couldn't be, I doubt that he had the right to rely on any such——

The Court: He didn't say that.

Mr. Holman: He said it was so unlikely or it was just impossible, one of the two.

The Court: There is a rule with which you are well acquainted that as between a crook and a fool, the Court will favor the fool. That is the rule. Of course, Dr. Lee was a fool for entering into a contract like this, but what should I do? That is the law that is laid down in the State of Oregon.

Mr. Holman: Your Honor, Mr. Myers testified in this case. He was the selling agent, and he said it would pay out within ten to twelve years, and there was nothing said about four years on his part. I believe Mr. Myers is a very believable witness and very sincere.

The Court: I heard the testimony of all these people. I don't recall him saying that it would pay out in ten years and frankly I do not believe it will pay out in ten years.

Mr. Holman: He said ten to twelve, your Honor, as I recall. There are a number of other cases in this memorandum. There is the old Scott vs. Walton case.

The Court: Where? [121]

Mr. Holman: That is under Point 6, 32 Oregon 460. In all of these cases one has to act almost immediately after the discovery.

The Court: After the discovery? The testimony here is that Dr. Lee says he did not discuss it until after he wrote a letter to the company accompanying his third premium. Then they came back and told him that no such representations were proper; that the amount of the premium does not accumulate in the sense that with each additional premium payment you get a larger dividend. It was at that time that he learned for the first time that the representations were not correct.

Now, as opposed to that, we have the testimony of Mr. Ross and the lawyer who say that they told Dr. Lee that 10 per cent was the only rate that was authorized, but he knew from looking at the policy that the Board of Directors had to authorize the dividends. Is that the type of notice that you would say would deprive a man of his right to proceed? Does that constitute an election? A man who make an election has to be acquainted with all the facts.

Mr. Holman: Your Honor, in this case it is very conceivable that the dividends could be much, much greater in a year or two. It just depends upon the growth of the company. They started out with great expectations. They paid 10 per cent, which is a substantial dividend. It could be—there have been some other companies who have paid 46 per cent, the Oklahoma company. [122]

The Court: I assume that they paid 10 per cent from the year that they started doing business, but I find that the representations made here amounted to something more than puffing. I have told you that they went far beyond that.

The real question here is does the payment of the last premium under the facts as developed in this case constitute a bar to recovery. That is what I am going to look at. You can furnish me some authority, too, if you wish, Mr. Bowles.

Mr. Bowles: I would be pleased to, your Honor, except that I leave Sunday for Philadelphia, and I doubt that I can get them in.

The Court: We have the time.

Mr. Bowles: I will be back around the first of May.

The Court: I will return the first of June. I told you yesterday that I thought this was the type of case that should be settled. I am still of that opinion. I could decide this case in a couple days from now by examining the authorities myself. I may do it. If I do not decide the case within the next few days, you may submit your authorities.

(Trial concluded.)

[Endorsed]: Filed July 11, 1960. [123]

United States District Court,
District of Oregon

Civil No. 10004

VIRGIL N. LEE,

Plaintiff,

vs.

EQUITABLE LIFE AND CASUALTY INSURANCE COMPANY,

Defendant.

and

Civil No. 211-59

MARGARET L. PAGETT,

Plaintiff,

vs.

EQUITABLE LIFE AND CASUALTY INSURANCE COMPANY,

Defendant.

Before: Honorable Gus J. Solomon, District Judge.

TRANSCRIPT OF PROCEEDINGS

April 19, 1960—10:00 A.M.

Appearances:

MR. ROLLIN E. BOWLES,
Of Attorneys for Plaintiffs.

MR. H. KENT HOLMAN,
Of Attorneys for Defendant.

The Court: This is the time set for the taking of testimony on the issue of damages in two cases. What are the names of the cases?

Mr. Bowles: One case is Virgil N. Lee vs. Equitable Life and Casualty, No. 10004. The other is Margaret L. Pagett vs. Equitable Life and Casualty Insurance Company, No. 211-59.

The Court: What was the face value of the policy in the Lee case?

Mr. Bowles: $16,033.

The Court: $16,033. That was payable at the end of 20 years?

Mr. Bowles: Yes, sir; or at paid-up insurance in that amount at the end of 20 years.

The Court: Just paid-up insurance?

Mr. Bowles: Yes, your Honor.

The Court: In the other case, Mrs. Pagett paid $500 a year. How old was she?

Mr. Bowles: She was 44 at the date of issue.

The Court: How much insurance did she have?

Mr. Bowles: $8,840.

The Court: That was because she was rated up? Ordinarily she would have gotten $10,000; isn't that right?

Mr. Bowles: That's right.

The Court: Call your first witness. [2*]

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

EUGENE J. OVERMAN

a witness produced in behalf of Plaintiffs, having been first duly sworn, was examined and testified as follows:

The Court: Mr. Overman is a trust officer at the United States National Bank. Are you an expert in life insurance?

The Witness: No, sir.

The Court: I don't think you are going to do us much good because here is the question we are going to propound to you, the only question we need: Assuming that a man 52 years of age, taking out a policy of insurance in the principal amount of $16,033, payable at the rate of $1,000 per year for a period of 20 years, the dividend for the first two years being 20 per cent of $1,000 and thereafter during the life of the policy the dividends being 20 per cent of the amount of the premiums, excluding the first year's premium, and at the end of 20 years he would be entitled to a paid-up policy in the sum of $16,033, what would a person have to pay to obtain such policy on the open market, assuming such policy were available? Can you answer that question?

The Witness: Well, your Honor, my thought or my information was that the interest rate guaranteed on this policy was a 20 per cent rate, and I was asked to come up here to determine if possible, from an investment banking standpoint, the investment phase of such a contract, that is, and if a policy guaranteeing 20 per cent is in excess of the

(Testimony of Eugene J. Overman.)

normal rate of return I was asked [3] to come up here to determine——

The Court: We will listen to you on that, but that is not the real issue involved in this case. I tried to make that clear to Mr. Bowles.

Mr. Bowles: I have the actuary from the State Department of Insurance here to answer that question, your Honor, and that is the question I understood the Court asked, what would be the value of this contract at its third anniversary date.

The Court: Third anniversary date?

Mr. Bowles: Yes. In the Pagett case it was March 31, 1958, and that would be the $500 premium, your Honor.

The Court: Give him your hypothetical question.

Direct Examination

By Mr. Bowles:

Q. There has been testimony, Mr. Overman, that the policy of insurance with which we were involved was sold as an investment policy with an annual premium of $500 per year, the anniversary date being March 31st, the first payment March 31st, 1955, of $500, a similar payment March 31, 1956, and a similar payment March 31, 1958.

The Court: Nothing in 1957?

Mr. Bowles: Or 1957; I am sorry, your Honor.

It has been testified that there would be a 20 per cent dividend paid at the end of the second policy year at the time of [4] the payment of the third premium, and 20 per cent would be paid on

(Testimony of Eugene J. Overman.)

all premiums accumulative following that date through the life of the policy.

Can you tell us what the value of such a contract would have been on March 31, 1958?

A. As I understand the situation, on March 31, 1957, a 20 per cent dividend was paid on the first year's premium, which would be $100. Then I assume on March 31, 1958, a 20 per cent dividend would then be paid on the total amount invested.

The Court: That is excluding the first year? That would be 20 per cent of $1,000?

The Witness: Well, your Honor, as I have the problem, it is 20 per cent dividend on all funds invested each March 31st, so it would be $500 invested on March, 1955, and 1956 and 1957, and this terminates it on March 31, 1958. I assume that the dividends at the high rate would have all been paid up to that time. Then we are concerned about the value of such a contract in subsequent years. We have assumed that a 4 per cent dividend rate would be the normal expectation. That rate of return is available from investment trust shares, so we have calculated the 20 per cent dividend payment contrasted with the same normal 4 per cent dividend payment on each year, subtracted the two, and then one comes to the problem of determining the present value of a future dollar; so we have then gone to Kent's 10-Place Interest and Annuity Tables, and determine the market value at [5] the 4 per cent discount rate to determine the present value of a future dollar. That has been our procedure of calculation.

(Testimony of Eugene J. Overman.)

Q. What did you find your value to be as of the dates stated of this contract?

A. Total value which we calculated was $10,-880.44.

Q. With respect to the Lee case——

The Court: First let me give you a hypothetical question.

Assuming that a woman 44 years of age takes out a policy of insurance in the principal amount of $8,840 payable at the rate of $500 per year for a period of 20 years and that the dividend after the first two years would be 20 per cent of $500 and thereafter during the life of the policy the dividend would be 20 per cent of the total amount of the premiums, excluding the first year's premium, and at the end of 20 years she would be entitled to a paid-up policy in the sum of $8,840 and that the $8,840 was a reduction from the usual amount of $10,000 because she was rated up, what would be the value of the policy at the end of the third anniversary of the issuance of the policy?

A. Well, your Honor, that takes an actuary to answer that question. My testimony is only on the investment phase of a theoretical or actual contract wherever it guarantees 20 per cent return as contrasted with a 4 per cent return.

The Court: Let me ask you one other question: You assumed that there would be a 20 per cent return on every premium that [6] was made, and you do not exclude the first year's premium, do you?

(Testimony of Eugene J. Overman.)

The Witness: The statement is on all funds invested.

The Court: So that would be including the first premium of $500?

The Witness: That is correct.

The Court: What would be your figure if you would exclude $500 for every year?

The Witness: That can be readily calculated, but it takes quite a bit of doing because the amount is reduced.

The Court: Every year it would be reduced by $500?

The Witness: That is correct.

The Court: That would be the largest sum. Would you say the figure would then run around $8,000 instead of $10,880?

The Witness: I would rather calculate that rather than estimate it.

The Court: You cannot give us an educated guess, then? Can you calculate it here, right now?

The Witness: Well, I can——

Mr. Holman: Does he have any tables with him?

The Witness: We have some tables, but they run out to ten places, and when you start calculating that we use a machine. To do it by hand is quite laborious.

Q. (By Mr. Bowles): How many dividends have you in your calculation accounted for, Mr. Overman? [7]

A. Sixteen. The first four dividends I assume were paid and were not entered into my calcula-

(Testimony of Eugene J. Overman.)

tions—or the first four years. As I understand, 1955 and 1956 there were no dividends, and 1957 there was a dividend on the first $500, and in 1958 a dividend on $2,000, but those have not been entered into the calculations at all. I assume they have been paid.

The Court: That is on the $500 policy?

The Witness: Yes, sir.

The Court: What would it be on the $1,000 policy?

The Witness: Assuming the same set of circumstances, the amount would be double $10,880.44.

The Court: That would be about $20,700?

Mr. Bowles: $20,760.88.

The Court: Is there any cross-examination?

Mr. Holman: Yes, your Honor.

Cross-Examination

By Mr. Holman:

Q. You said this 4 per cent dividend rate was applicable, and you said it was normal. What is it normal for?

A. My statement was that the 4 per cent return was available from the investment trust shares which were available for purchase by an investor at that time.

Q. What are these investment trust shares that you refer to?

A. Massachusetts Investors, Inc., Investors Group Securities, [8] George Putnam Fund.

(Testimony of Eugene J. Overman.)

Q. Do they have an average 4 per cent return?

A. Approximately that.

Q. What you took, in effect, was a 4 per cent discounted dividend table; is that right?

A. What we did, we first figured the dividend at 20 per cent and then at 4 per cent, subtracted one from the other, and then we used the tables to determine the present value of a future dollar. The dollar which you have coming to you ten years from today is not worth a dollar.

Q. I realize that.

The Court: Do you think that 4 per cent is too high?

Mr. Holman: I am just trying to find out what he did here, your Honor.

The Court: The company guaranteed only 3 per cent. If you want him to take a 3 per cent calculation, it would be considerably more.

Mr. Holman: Well, did he take the 4 per cent discount and multiply that by 5 to arrive at the value.

The Witness: No, I assumed that—to take the first year, take March 31, 1959. At that time, as I understood the problem, there would be $2,500 invested. 4 per cent of that would be $100; 20 per cent would be $500, so you have a differential of $400 for a premium.

Then I took the $400, went to the annuity tables to [9] determine the multiple, to determine the present value of a future dollar, and that multiple

(Testimony of Eugene J. Overman.)

was .9615384615, and multiplying that by 400 I came out with $384.62.

Q. What is this table now? Is that the discount value? A. At 4 per cent; yes, sir.

Q. At 4 per cent, and you multiplied that times the $400?

A. That's for the first year. Now, the next year you repeat the process. The next year the interest differential is $480.

Q. Why didn't you multiply it at the time with the $500?

A. Because each year you get a different dividend. Each year your dividend goes up because you have more money invested.

Q. But I do not understand why you subtract the 4 per cent from the 20 per cent?

A. To determine the amount of premium.

Q. The amount of premium?

A. Because your policy which guarantees you 20 per cent is worth more than one that you get only a 4 per cent return in trying to determine the value of the premium.

Q. What you are saying is that this policy, or whatever it is, is worth $10,000 more in an investment in Massachusetts Investment Trust; is that about it?

A. What I am saying is that a contract which a 20 per cent guaranteed return is worth that sum more than a contract which [10] has a 4 per cent guaranteed return.

Q. What tables did you use?

(Testimony of Eugene J. Overman.)

A. The 10-Place Interest and Annuity Tables by Kent.

Q. Then you use the standard 4 per cent table?

A. 4 per cent discount table. They have it at varying interest rates. You can go from one-fourth of one per cent up to 10½ per cent.

The Court: Are there any further questions. Would there be any difference if you would consider the value as of the date of issue rather than four years or three years later?

The Witness: Well, your Honor, this is—my testimony is solely on the investment problem, not on the usual phase of the contract.

The Court: If you considered the value of the contract as of March 31, 1955, instead of March 31, 1958, would that make any difference?

The Witness: Yes, the value would be smaller.

The Court: The value would be smaller in 1955?

The Witness: Because we have to wait longer to get——

The Court: Would that be an appreciable difference?

The Witness: Modestly so, yes.

The Court: A modest difference. Would it amount to more than two or three thousand dollars?

The Witness: I would say No.

The Court: You have not taken into consideration the fact [11] that if a person died earlier, that they would be entitled to the full face of the policy?

The Witness: I have not, your Honor.

Mr. Holman: I understand what he is telling.

The Court: That is all.

Mr. Bowles: I have no further questions.

The Court: That is all, Mr. Overman. You are excused from further attendance at the trial.

(Witness excused.) [12]

FRANK HOWATT

a witness produced in behalf of Plaintiffs, having been first duly sworn, was examined and testified as follows:

The Court: What is your occupation?

The Witness: Your Honor, I am the Actuary for the State Insurance Department.

The Court: Have you a degree in, what do you call it, actuarial science?

The Witness: No, sir.

The Court: Did you go to the University of Iowa?

The Witness: No, I went to the University of Oregon. I have passed the first four parts of the examination for the Society of Actuaries.

The Court: How long have you been with the State?

The Witness: Since last August.

The Court: Where were you before that time?

The Witness: I was with the Hartford Life Insurance Company for eleven years.

The Court: Have you determined premiums in connection with your work?

The Witness: Yes.

The Court: Proceed.

(Testimony of Frank Howatt.)

Direct Examination

By Mr. Bowles:

Q. Mr. Howatt, have you had an opportunity to examine the [13] files of the State Department of Insurance with respect to a policy issued to Margaret L. Pagett?

A. I have ascertained that a policy, which I was shown and which was stated to be identical to the policy in question, was filed with the State Insurance Department.

The Court: You may take the original and look at it.

The Witness: Yes, this policy is the same form that has been filed with the State Insurance Department.

Q. (By Mr. Bowles): What would have been the value of that particular policy on March 31, 1958?

A. On March 31, 1958, the cash surrender value of the Pagett policy would be $442, excluding dividends and without regard to any indebtedness on the policy.

Q. Have you likewise had an opportunity to determine if a policy of that nature was filed with respect to Virgil N. Lee?

The Court: Why do you need that? The policy speaks for itself. He is not testifying to anything else than what is in the policy. Mr. Bowles, that is not what I wanted to know.

Let me ask you some questions. Assuming that

(Testimony of Frank Howatt.)

Margaret L. Pagett on March 31, 1955, purchased a policy of insurance of the kind that you have seen which calls for payments of $500 annually at the age of 44, and at the end of 20 years she would have a paid-up policy of $8,840 because she is rated up and ordinarily she would get a paid-up policy of $10,000, what could she sell that policy for if she could have sold it and if it was [14] salable on the date she purchased it, having the terms and conditions set forth in that policy?

The Witness: Well, the best I can answer that is that from my experience the premium on that policy is a reasonable premium for the benefits provided in the policy.

The Court: In other words, she may not have lost anything, but she certainly couldn't sell it for a profit?

The Witness: Right.

The Court: Now, assume that on that date she bought a policy, and in addition to these terms she was to get 20 per cent of the premiums that she paid in, excluding the premium on the first year. What could she have sold that policy for on the date that she purchased it?

The Witness: Well, your Honor, I am not prepared to answer that question, but it would be a strictly arithmetical exercise to determine the value. If I understand your assumption, the first dividend at the end of the second year on one premium of $500 would be $100. At the end of 20 years it would

(Testimony of Frank Howatt.)

be 20 per cent of nineteen premiums, which would be $3,800.

The Court: That is right.

The Witness: That would have a value substantially in excess of the sum of the premiums that she is paying, obviously. Disregarding interest, that simply adds up to $19,000. Now, the value would be less than that because of the interest, but it might be in the neighborhood of, I hazard a guess of $13,000. [15]

The Court: That is on the $500 policy?

The Witness: Yes.

The Court: Asking you the same question as far as Mr. Lee is concerned, who was 52 years of age and paid a thousand dollars, at the end of 20 years he would get a paid-up policy of $16,033 plus the premiums and the benefits set forth in the policy, could he have sold that policy at a profit?

The Witness: The same comments apply to that policy. The values, disregarding the insurance benefits, are double because of the double premium.

The Court: In other words, he could not have sold that policy for anything, the policy that he got. He would not have made a profit on this policy that he received from Equitable Life and Casualty Company?

The Witness: I fail to see how he could.

The Court: Actually, in actual fact, because of the administrative expenses during the first year and the various costs that are legitimately charged

(Testimony of Frank Howatt.)

to a policy, he would probably have had to settle for a loss, wouldn't he?

The Witness: That's right. There is no value to the policy itself until the end of two years or three years, I am not sure.

The Court: That is for the guarantee of the company?

The Witness: Right.

The Court: That is because on a policy of this kind [16] ordinarily a large slice is paid to the——

The Witness: Selling agent.

The Court: ——the selling agent, up to 80 per cent on these policies.

Now, assume that a man 52 years of age would put in a thousand dollars as provided for in that policy and he got a policy of $16,033, and he paid the premiums at the rate of a thousand dollars per year for a period of 20 years and that the dividend for the first two years would be 20 per cent of a thousand dollars and thereafter during the life of the policy the dividend would be 20 per cent of the total amount of the premiums, excluding the first year's premium, and that at the end of 20 years he would be entitled to a paid-up policy in the face of the policy—that is, $16,033. What would a person have to pay to sell a policy on the open market, assuming such a policy were available? Do you know that?

The Witness: No, sir. I do not. Well, I should say I simply don't know what a policy like that

(Testimony of Frank Howatt.)

would sell for. It would be substantially in excess, in my opinion, of the premium that was paid.

The Court: Assuming that a man could get a policy of that kind, what would he be able to sell the policy for on the date of its issue, assuming that he was in a position to sell it?

The Witness: Well, normally, an insurance policy is not transferable. All that he would be able to sell it for at any [17] time, I would think, would be the cash value actually promised by the policy, that is, he could assign the cash value of the policy.

The Court: What would his loss of the bargan be? That is what we are trying to find out. If a policy like that were written and a policy of the kind that was actually written, what would be the difference in the bargain or the benefit of the two policies? Would it be over $20,000?

The Witness: Did you say would it be over $20,000?

The Court: Yes.

The Witness: It would be in that neighborhood, I would think.

The Court: In the neighborhood of around $20,000?

The Witness: Yes, sir.

The Court: Assuming that a man was promised and he thought he was getting such policy in the assumed question and he actually got the policy that was written, in your view, the loss that he incurred would be approximately $20,000?

The Witness: Yes, probably in excess of that. I

(Testimony of Frank Howatt.)

am answering that on the basis that it appears to me that the premium that was paid was a reasonable premium for a participating life insurance policy with modest dividends and that anything that was promised in excess of that would be pure gain.

The Court: Are there any further questions?

Mr. Bowles: I have no further questions, your Honor. [18]

Cross-Examination

By Mr. Holman:

Q. This $20,000 that you talk about, that would be contingent on Dr. Lee living, wouldn't it?

A. Yes.

Q. And the same would be true as far as Margaret Pagett is concerned? A. Yes.

Q. Have you ever heard of a case where a company issuing a participating life insurance policy guaranteed dividends?

The Court: I have already decided that question, that your man was guilty of fraud. It does not make any difference. I assume that no company in its right mind would ever offer a policy of the kind that is described. You do not have to convince me of that.

Mr. Holman: Well, we do not have any exact figures yet, do we, on this thing from anyone?

The Court: That is right. Do you have any more questions of Mr. Howatt?

Mr. Holman: If you are convinced that no company would issue such a policy, then I don't need the answer from the witness.

The Court: No, but the question is not whether a company would issue it; but if it did issue it, what would be the value of the policy. That is the question we are trying to find out. [19]

Mr. Holman: I understand.

The Court: No company will issue that kind of policy, but when Ponzi sold stock to his people, no company would have issued the kind of agreement he described, and yet people bought and paid him money for it. That is all. Does the plaintiff rest?

Mr. Bowles: I would like at this time, in accordance with Rule 15(b), to enter a motion to amend the pleadings.

The Court: I think you are a little late now. I am going to deny your motion. Call your witness, Mr. Holman.

Mr. Holman: I have no witness.

The Court: I think, Mr. Bowles, that you are entitled to the full amount of your prayer in each case because it is considerably lower than what I would have allowed had you come in earlier with the benefit of the bargain theory because it seems to me that if this policy had been written the loss of bargain in the Lee case would have been at least $20,000, and the loss of bargain in the Pagett case would have been at least $10,000. However, as far as general damages are concerned in these two cases, you have asked for $3,000 on the Lee case, and you have asked for $1,000, I think, on the Pagett case.

I am going to allow these amounts plus interest. You have asked for punitive damages, too, have you not?

Mr. Bowles: I have, your Honor.

The Court: I don't know whether I can allow punitive [20] damages in this case, but I will take a look and see. You have asked for some $10,000 in punitive damages in one case?

Mr. Bowles: Yes, I have.

The Court: I will let you know in the next couple of days whether I allow any punitive damages or not, and if so, how much.

Mr. Holman: Would you like any authority on that, your Honor, on punitive damages?

The Court: Yes. Have you any authority?

Mr. Holman: Not with me, but I can have it in the next day or so if you would like to have it.

The Court: That is fine. Is it your opinion that I cannot allow punitive damages?

Mr. Holman: Yes, your Honor, in this case it is; yes, your Honor. Punitive damages would not be allowable in this case.

The Court: I would like to have the authorities if you have them. Have you any authorities?

Mr. Bowles: None other than the general that punitive damages are allowable where fraud is found.

The Court: Selman vs. Shirley allowed punitive damages.

Mr. Holman: I know they did, your Honor. It has been our contention throughout this case that it has been more in the nature of a rescission action.

The Court: I decided against you on that. There is no [21] rescission. I hold that my ruling now is not on the basis of rescission.

Mr. Holman: I understand that, your Honor.

The Court: I am deciding on damages, and I am allowing the full amount of the damages that he requested on general damages without regard to the question of rescission. I have denied rescission.

Mr. Holman: Yes, I understand that. His plea was for damages which would amount to rescission damages, and on that basis I don't think he should be allowed punitive damages in this case.

The Court: Your point is that this is a rescission?

Mr. Holman: Yes.

The Court: I am going to hold against you on that.

Mr. Holman: I don't know whether the allegations are sufficient in the complaint for maliciousness, and so on, to support punitive damages.

The Court: If that is the case, I will let you amend and put the allegations in because I have heard the evidence.

Mr. Holman: We concede that Selman vs. Shirley is a leading case in Oregon. There is no dispute on that.

The Court: I am going to allow $2,000 damages in the Lee case, punitive damages, and because of the smaller amount in the Pagett case I will allow $1,250.

Mr. Bowles: Shall I submit appropriate Findings of Fact? [22]

The Court: You submit Findings of Fact and Conclusions of law, and I will sign them after you submit them to Counsel.

Mr. Bowles: Yes, sir; I certainly shall.

The Court: I understand, Mr. Holman, that your company man stated that the defendant will appeal this case to the Supreme Court of the United States. He will have that opportunity. There are other cases pending, and we will try the other cases, too.

Mr. Holman: That will be in May some time?

The Court: No, we will try the other cases the latter part of June. We will finish those cases also, and then you can appeal them also, if the rulings are the same.

I understand from you that the facts in all these cases are practically identical, are they not?

Mr. Holman: Well, I think there are different selling agents in these other cases, your Honor.

Mr. Bowles: The factual matters are the same, your Honor, and there are a number of cases that I have that will be filed promptly in this matter. There are now three that are to be for trial as soon as the pleadings and issues are made out, but the factual background is similar all around.

Mr. Holman: I would not say the facts are the same in each case, your Honor.

The Court: Very well. That is all.

(Testimony closed.) [23]

Reporter's Certificate

I, Gordon R. Griffiths, an Official Court Reporter to the United States District Court for the District of Oregon, do hereby certify that at the time and

place mentioned in the caption of the foregoing transcript I reported in shorthand all proceedings had and testimony adduced in the foregoing-entitled causes; that I thereafter caused my shorthand notes to be reduced to typewriting under my direction, and the foregoing transcript, consisting of Pages 1 to 23, is a true and correct transcript of all said proceedings had and testimony adduced, and of the whole thereof.

Witness my hand at Portland, Oregon, this 10th day of June, 1960.

/s/ GORDON R. GRIFFITHS,
Official Court Reporter.

[Endorsed]: Filed July 11, 1960.

[Title of District Court and Cause.]

DOCKET ENTRIES

1958

Sept. 29—Filed complaint.

Sept. 29—Issued summons—to Marshal.

Oct. 3—Filed summons—with Marshal's return.

Oct. 17—Filed Answer.

Dec. 15—Entered Order setting for pretrial conference February 16, 1959.

Dec. 15—Filed deposition of Virgil N. Lee (for defendant).

Dec. 31—Filed deposition of Osbourne R. Myers (for pltf.).

Dec. 31—Filed deposition of Leo H. Rognlie (for pltf.).

1959

Feb. 16—Lodged Pretrial Order.

Feb. 16—Entered Order setting for trial April 21, 1959.

Feb. 25—Entered Order striking from trial calendar and resetting for trial week of April 13, 1959.

Apr. 10—Filed Petition for issuance of subpoena duces tecum.

Apr. 10—Filed and Entered Order for issuance of subpoena duces tecum.

Apr. 10—Issued 1 subpoena duces tecum and 1 copy to Clifford Ingham, Office of Oregon State Commissioner.

Apr. 12—Filed and entered Pretrial Order (Microfilmed June 30, 1960).

Apr. 13—Issued subpoena—3 copies—to pltff's. atty.

Apr. 13—Record of trial by Court; evidence adduced; Entered Order continuing to Tuesday, April 14, 1959, at 10:00 o'clock a.m.

Apr. 13—Filed and entered Amended Pretrial Order (Microfilmed June 30, 1960).

Apr. 14—Record of further trial by court; evidence adduced; arguments of counsel; submitted; Entered Order that pltf. submit authorities by June 1, 1959.

May 29—Filed Pltf's. Memorandum on Question of waiver in response to deft's. memorandum.

Sept. 23—Record of Opinion and entered Order that same be filed.

1959

Sept. 23—Filed Opinion.

Oct. 13—Filed deft's. brief re application of proper rule for measure of damages.

1960

Apr. 19—Record of court trial continued on issue of damages.

Apr. 19—Record of statement by Court regarding preparation of findings of fact & conclusions of law & judgment by pltf.

Apr. 21—Filed Cost Bill.

May 12—Received from Judge Solomon in New York.

May 12—Filed and entered findings of fact and conclusions of law (signed May 11, 1969).

May 12—Filed and entered judgment for plaintiff in the sum of $3,000.00 general damages and $2,000.00 punitive damages (order signed May 11, 1960) ntfd. and costs.

June 8—Filed defendant's notice of appeal. (Served).

June 13—Filed supersedeas bond with approval of Judge East.

July 7—Filed appellant's designation of record on appeal.

July 7—Filed statements of points to be relied upon.

July 7—Filed appellant's motion for order to forward exhibits to Court of Appeals.

July 7—Filed appellant's motion to forward exhibits to Court of Appeals.

1960

July 8—Filed and entered order to forward exhibits to Court of Appeals.

July 11—Filed Transcript of proceedings, dated April 19, 1960.

July 11—Filed Transcript of proceedings, of April 13 and 14, 1959.

July 12—Filed Def't. Motion for extension of fifteen days' extension from date hereof, within which to file and docket appeal.

July 12—Filed and Entered Order allowing deft. fifteen days' extension from date hereof, within which to file and docket appeal.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Summons; Answer; Pretrial Order; Amended Pretrial Order; Defendant's Trial Memorandum Points and Authorities (not filed); Defendant's Additional Trial Memorandum on Question of Waiver or Affirmance of Fraud (not filed); Defendant's Brief Re Application of the Proper Rule for the Measure of Damages; Plaintiff's Brief Re Application of the Rule for Proper Measure of Damages (not filed); Opinion of Judge Gus J. Solo-

mon; Findings of Fact and Conclusions of Law; Judgment Order; Notice of Appeal; Supersedeas Bond; Statement of Points to Be Relied Upon; Appellant's Designation of Record on Appeal; Order to Forward Exhibits to Court of Appeals; Order Extending Time to Docket Appeal; and Transcript of Docket Entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 10004, in which Equitable Life and Casualty Insurance Company is the defendant and appellant and Virgil N. Lee is the plaintiff and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith reporter's transcripts of proceedings of April 13 and 14, 1959, and April 19, 1960, together with Exhibits 1; 4 to 8, inclusive; 10; 11; 17-B (for plaintiffs) and Exhibit 16 (for defendant).

I further certify that the cost of filing the notice of appeal, $5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 21st day of July, 1960.

[Seal] R. DEMOTT,
Clerk;

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 17038. United States Court of Appeals for the Ninth Circuit. Equitable Life and Casualty Insurance Co., Appellant, vs. Virgil N. Lee, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed July 22, 1960.

Docketed August 10, 1960.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 17079

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

[illegible] MALLAHON, Trustee in Bankruptcy of the Bankrupt Estate of [illegible] SANFORD, INC.,

Appellant,

vs.

[illegible] OF AMERICA NATIONAL TRUST AND SAVINGS [illegible], etc.,

Appellee.

APPELLANT'S OPENING BRIEF.

[illegible] J. TIERNAN,
[illegible] West Seventh Street,
[illegible] Angeles 14, California,
Attorney for the Trustee.

[illegible] Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

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No. 17039

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. E. MALLAGH, Trustee in Bankruptcy of the Bankrupt Estate of ORVILLE STANFORD, INC.,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, etc.,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdictional Basis.

This is an appeal from a final Judgment made and entered in the United States District Court for the Southern District of California, Central Division and this Appeal is prosecuted in accordance with the provisions of Rule 72 *et seq.* of the Federal Rules of Civil Procedure.

On July 17, 1958, Appellant filed his Complaint in the United States District Court for the Southern District of California [Clk. Tr. pp. 3-7]. The Defendant Appellee, Bank of America, filed its Answer to the Complaint and its First Amended Answer thereto [Clk. Tr. pp. 8-11; 15-17].

On July 15, 1960, Plaintiff Appellant filed a Motion for Summary Judgment accompanied by Affidavits [Clk. Tr. pp. 24-28].

Thereafter, the Defendant filed counter-Affidavits and a Motion to Dismiss the Complaint [Clk. Tr. pp. 29-32].

Both Plaintiff and Defendant thereupon filed further Affidavits in support of the Motion for Summary Judgment and the Motion to Dismiss [Clk. Tr. pp. 33-39].

The United States District Judge, the Honorable Peirson Hall, made an Order denying Plaintiff's Moton for Summary Judgment and granting Defendant's Motion to Dismiss without leave to amend [Clk. Tr. p. 42].

Because the Order of the United States District Judge went only to the First Claim, a Stipulation for Judgment was made by and between the parties and a Judgment pursuant to the Stipulation made and entered by the United States District Judge. The second claim was dismissed without prejudice [Clk. Tr. pp. 43-45].

Plaintiff Appellant thereupon filed a Notice of Appeal to the above entitled Honorable Court [Clk. Tr. p. 45].

Statement of the Case.

This was an action at law commenced by the Trustee in bankruptcy to recover from the Defendant, Bank of America, upon a complaint filed in the United States District Court, based upon two (2) claims or causes of action. The First claim is to recover moneys paid to the Bank under a void Chattel Mortgage, the Chattel Mortgage being void as to a Trustee in Bankruptcy and as

to creditors for the failure of the Bank to record the Mortgage in the County where the personal property was removed. The property concerned was a portable oil drilling rig.

The Second claim is based upon a preference under Sections 60a and 60b of the Bankruptcy Act. Since this claim was dismissed without prejudice it is not under consideration on this appeal.

In the course of the proceedings before the trial Judge the Plaintiff, Trustee in Bankruptcy, filed a Motion for Summary Judgment and the Defendant Bank responded with counter affidavits and by filing a Motion to Dismiss the First Cause of Action. The Motion for Summary Judgment and the counter motion for dismissal was directed to the First Cause of Action only.

It is believed that the only issues in the case are legal. The facts are as follows:

A. E. Mallagh, Plaintiff is the Trustee in Bankruptcy of the bankrupt estate of Orville Stanford, Inc., a California corporation. A voluntary Petition in Bankruptcy was filed by this corporation in the United States District Court for the Southern District of California on February 20, 1958.

Sometime during the month of September, 1956, the bankrupt concern, which was engaged in oil drilling and related activities, entered into a loan transaction with the Bank of America and in connection with this transaction, executed a Promissory Note and a Mortgage of Chattels covering a portable oil drilling rig and accessories used in their drilling operations. The principal office of the bankrupt concern was located in Santa Barbara County and the Mortgage was recorded in Santa Barbara County.

Sometime in October of 1957, the drilling rig and the accessories were moved to Kern County under a lease arrangement with a local firm in that area. The property remained in Kern County from October 8, 1957 until January 10, 1958, approximately six weeks before bankruptcy, at which time the personal property was sold by the bankrupt concern for a total gross consideration of Twenty-six Thousand Five Hundred Dollars ($26,500.00). The transaction for this sale was handled by defendant Bank of America who received the total consideration, deducted the sum of Thirteen Thousand Nine Hundred Forty-nine Dollars and Twenty-five Cents ($13,949.25) (being the balance due upon the loan for which the Chattel Mortgage was given as security) and then remitted the balance after other deductions to the bankrupt concern.

The Bank of America did not at any time record its Chattel Mortgage in Kern County, nor did the Bank file with the Secretary of State in accordance with the provisions of 2965 of the Civil Code of the State of California.

There are creditors of the bankrupt concern whose claims rose prior to the time that the personal property was removed to Kern County in October of 1957. These same creditors remain unpaid as of the date of the filing of the Petition in Bankruptcy and these creditors have filed claims in the bankruptcy proceedings.

On or about June 11, 1958, Plaintiff herein made a written demand upon the Defendant, Bank of America, for the return of the sum of Thirteen Thousand Nine Hundred Forty-nine Dollars and Twenty-five Cents ($13,949.25). This demand was refused, action at law followed.

ARGUMENT.

POINT ONE.

The Chattel Mortgage of the Bank of America Was Void Under California Law as to Creditors and Is Void as to the Trustee in Bankruptcy.

The first claim of appellant is that the Bank received certain funds as the holder of the chattel mortgage on personal property, said chattel mortgage being void for the reasons set forth in the complaint. It is the position of the Appellant herein that such a void mortgage confers absolutely no rights upon the defendant, Bank of America, and that the moneys received by virtue thereof are an asset of the bankrupt estate to be distributed among all the creditors of the estate, equally, and pro-rata.

The complaint seeks to avoid the chattel mortgage and to have the same declared void and to recover the moneys paid by the bankrupt by virtue of the provisions of the California Civil Code with respect to chattel morgages covering personal property.

It is believed that the case at Bar is on all fours with the principles enunciated in two recent cases which were decided in this Circuit. Those cases (which will be referred to later in this Brief), are as follows:

Miller v. Sulmyer (C. A. 9, 1959), 263 F. 2d 513;

Chapman v. England (C. A. 9, 1956), 231 F. 2d 606.

The pertinent provisions of the California Civil Code are:

Section 2957, Subdivision 4, which reads as follows:

> "A mortgage of personal property or crops is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value, unless . . .
>
> 4. The mortgage, if of personal property other than crops growing or to be grown or animate personal property, is recorded in the office of the recorder of each of the counties where the property mortgaged is located and where the mortgagor resides at the time the mortgage is executed, provided that in case the mortgagor is a non-resident of this State no recordation where the mortgagor resides is required, *and, in case the property mortgaged is thereafter removed to another county of this State, either the mortgage is recorded in that county or there is or has been filed a statement of recordation as prescribed in Section 2965;*" (Emphasis supplied.)

and Section 2965 of the Civil Code, Subdivisions 1, 2, and 3, which read as follows:

> "When personal property mortgaged (other than animate personal property mortgaged by a resident of this State, and motor vehicles and other vehicles defined in and the mortgaging of which are regulated by the California Vehicle Act) is removed from the county in which it is situated, constructive notice of the mortgage imparted by recordation shall not be affected thereby for 30 days after such removal; but, after the expiration of such 30 days, said recordation shall not impart constructive

notice while said property remains removed from the county:

1. Until the mortgagee causes the mortgage to be recorded in the county to which the property has been removed; or

2. Unless the mortgage causes or has caused a statement of recordation to be filed; or

3. Until the mortgagee takes possession of the property as prescribed in the next section."

In 1931, in *Moore v. Bay,* 284 U. S. 4, the United States Supreme Court established by unanimous opinion two fundamental principles of bankruptcy law:

First, that when under state law a transaction is voidable or void to any extent by a creditor of the bankrupt having a provable claim, the transfer is entirely void as to the Trustee in Bankruptcy. That is to say, the extent of the Trustee's recovery is not limited to the amount of the claims upon which he relies in attacking the transfer.

Second, that the recovery thus made by the Trustee, is to be distributed *pro rata* to all creditors of the bankrupt, in accordance with the distributive provisions of the Bankruptcy Act, and not only to those creditors who might have attacked the transfer outside of bankruptcy. While the Supreme Court's decision was rendered in the characteristically brief style of Mr. Justice Holmes, analysis of the opinion of the Ninth Circuit, *In re Sassard & Kimball,* 45 F. 2d 449 (C. A. 9, 1930), which was reversed *sub nom. Moore v. Bay,* leaves no doubt that the holding established both the foregoing propositions. Since 1931, there has not been a single Court of Appeals or Federal District Court which has denied the

rule that a transaction void or voidable in part by creditors of the bankrupt, is completely void under Section 70e of the Bankruptcy Act as against the Trustee in Bankruptcy. Thus, the Second Circuit stated in *City of New York v. Rassner,* 127 F. 2d 703, 707 (C. A. 2, 1942):

> '"... in many cases chattel mortgages are valid as against some creditors and not others; and yet ever since Moore v. Bay, 284 U. S. 4, 52 S. Ct. 3, 76 L. Ed. 133, 76 A. L. R. 1198, it has been considered proper to invalidate a mortgage *in toto* even though the only creditor entitled to invalidate has an insignificant claim, and proper to distribute the proceeds among all the creditors."'

The Fourth Circuit in *Friedman v. Sterling Refrigerator Co.,* 104 F. 2d 837, 840 (C. A. 4, 1939), held:

> '"... it is held that a claim which for want of record is void as against some but not all of the creditors of the bankrupt may be avoided *in toto* by the trustee in bankruptcy, even though creditors generally benefit by the avoidance."' (Trustee relied upon a provable claim of $14.23 to set aside a security transaction involving more than $500.00).

Likewise, the Fifth Circuit has held in *Corley v. Cozart,* 115 F. 2d 119, 121 (C. A. 5, 1940):

> '"The bill of sale to secure debt, being admittedly invalid as against subsequent creditors without notice, was properly held to be invalid in its entirety on objection of the Trustee in Bankruptcy. A claim void against some of the creditors of a bankrupt may be avoided in its entirety by the Trustee even though creditors generally benefit by the avoidance."'

POINT TWO.

The Trustee Has the Right and the Duty to Recover the Moneys Paid to the Appellee Bank.

The pertinent sections of the Bankruptcy Act under which the Trustee in Bankruptcy proceeded are Sections 70c and 70e.

> 70c. "The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitations, statutes of frauds, usury and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The *Trustee,* as *to all property whether or not coming* into *possession or control of the court upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings whether or not such a creditor actually exists.*" (Italics supplied.)
>
> 70e. "A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor."

The leading case on the interpretation of these sections is the case of *Constance v. Harvey* (C. A. 2, 1954), 215 F. 2d 571; cert. den., 348 U. S. 913. The rights of a trustee as a so-called "ideal creditor" has also been

interpreted in this Circuit is the case of *England v. Sanderson* (C. A. 9, 1956), 236 F. 2d 641. This case involved the interpretation of the California statute increasing the homestead exemption. The court said in connection with this ruling at page 643:

> "[3] The trustee is given under Sec. 70 sub. c of the Bankruptcy Act all the rights, remedies and powers of a hypothetical creditor holding a lien obtained by legal or equitable proceedings at the time of bankruptcy. . . ."

For examples of cases in other districts wherein the trustee was set aside chattel mortgages or recovered property for the benefit of the estate where void chattel mortgages were concerned, see the case of *In re Consorto Construction Company* (C. A. 3, 1954), 212 F. 2d 676. See further the case of *Zamera v. Goldblatt* (C. A. 2, 1952), 194 F. 2d 933, cert. den., 343 U. S. 979. See finally the case of *In re Kranz Candy Company* (C. A. 7, 1954), 214 F. 2d 588.

It should be observed that in the interpretation of Section 70c of the Bankruptcy Act, the trustee's rights will vary from state to state insofar as the rights of creditors themselves vary according to the law of the state where the transaction occurred. The reason for this and the nature of this so-called dichotomy in federal and state laws is set forth in the case of *In re Driscol* (S. D. Cal. 1954), 127 Fed. Supp. 81, where the court in quoting from another case said at page 62:

> "This Dichotomy between federal and state law is succinctly stated in Commercial Credit Co. v. Davidson, 5 Cir. 1940, 112 F. 2d 54, 55: 'We are controlled by federal law in determining what

liens are preserved in bankruptcy; what character of title to the debtor's property is vested in the trustee in bankruptcy; and, as to such property, what rights, remedies, and powers are deemed vested in the trustee. We look to state law to ascertain what property the debtor owned immediately preceding the time of bankruptcy; what liens thereon, if any, then existed; the character thereof; and the order of priority among the respective creditors holding such liens.' "

By far the most significant feature of California law insofar as the rights of creditors (and hence the rights of the trustee) is concerned is that the *California law confers absolutely no rights upon the holder of a void chattel mortgage.* As a result of this situation a creditor (and hence a trustee) has the right to follow the property or its proceeds into the possession of the holder of the chattel mortgage and to recover the same. The leading case in this district is the case of *Chapman v. England* (C. A. 9, 1956), 231 F. 2d 606. In this case a trustee in bankruptcy was held able to reach the proceeds of an insurance policy covering property which had been damaged and upon which the claimant held a void mortgage. The trustee was able to recover these proceeds even though the insurance policy contained the usual loss-payable clause in favor of the mortgagee. Incidentally in this case the mortgage in question was held void for the same reasons as is set forth on the complaint on file herein, *i.e.,* the failure to record after the property had been removed to another county.

The most recent case involving the principles of the case at Bar is the case of *Miller v. Sulmyer* which was

decided in the Court of Appeals for the Ninth Circuit on or about January 16, 1959. (236 F. 2d 513.)

In this case a chattel mortgage was held to be void because the same was not recorded promptly. The court held the mortgage to be wholly void and further held that the trustee was entitled to recover the proceeds which the mortgagee held after repossessing and selling the mortgaged property. The Court of Appeals specifically rejected the mortgagee's argument that repossession before bankruptcy cured the infirmity in the mortgage. Sale and payment logically can give no rights either.

Noyes v. The Bank of Italy (1929), 206 Cal. 266.

See also the case of *Ruggles v. Cannady* (1898), 127 Cal. 290.

The best discussion on the question of possession and the ability of a creditor to reach property even after there had been a foreclosure and sale is the case of *Chelhar v. The Acme Garage* (1936), 61 P. 2d 1232, 18 Cal. App. 2d 775, where the court said on page 779:

> "The mortgage, as to the creditors of the mortgagor, was always void. It continued to be void notwithstanding the fact that the mortgagee assumed to take possession under and to sell the property by virtue of said void instrument. As between these mortgagers and creditors, it was the same as if the mortgage did not exist, and the mortgagee could not, as against those creditors, obtain any rights under it. How could a mortgagee in a void mortgage as against creditors obtain any title to property by virtue of such mortgage? As against them the mortgagee could not rightfully

take the property by virtue of this void instrument, and if she did take it in spite of the fact that the mortgage was void and no protection to her, how could she secure any further or greater right by the sale of the property and the receipt of its value?"

Wherefore, it is respectfully submitted that plaintiff is entitled to summary judgment for the relief requested in the complaint and that the District Court erred in granting defendant's motion to dismiss. The Judgment should be reversed with instructions to enter a Judgment in favor of appellant.

Dated: This 15th day of November, 1960.

WILLIAM J. TIERNAN,

Attorney for the Trustee.

No. 17039

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. E. MALLAGH, Trustee in Bankruptcy of the Bankrupt Estate of ORVILLE STANFORD, INC.,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, etc.,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Jurisdictional Statement.

Jurisdiction of the District Court was invoked under 28 U. S. C. Sec. 1334 and 11 U. S. C. Sec. 46. The jurisdiction of the United States Court of Appeals is invoked under 28 U. S. C. Secs. 1291 and 1294(1).

Procedural Statement.

The Trustee appeals from a final judgment of the District Court dismissing without leave to amend, the first claim set out in the complaint. The second claim was dismissed without prejudice by stipulation, and the judgment appealed from contains the recitals requisite to finality specified by Rule 54b, F. R. C. P. [Tr. 44-45.]

The plaintiff trustee also made a motion for summary judgment upon the first claim only [Tr. 24] which was denied by order of the District Court entered April 25, 1960. [Tr. 42.] Although plaintiff specified the denial of his motion as error, [Tr. 48] and suggests in his brief that the lower court, erred in this respect,

(Br. 13) the order of April 25, 1960 was not appealable in any event because it did not dispose of the second claim. [Tr. 42.] No question is therefore raised on this appeal as to the propriety of the District Court's refusal to grant plaintiff's motion for summary judgment. F. R. C. P. Rule 56. *Williams v. Peters,* 233 F. 2d 618 (C. A. 9, 1956); *Gillespie v. Norris,* 231 F. 2d 881 (C. A. 9, 1956).

Statement of Facts.

Appellant's statement of facts (Br. 3-4) is not controverted except in the following respects:

1. Appellant states (Br. 4) that "the transaction for this sale [of the drilling rig] was handled by the defendant Bank of America * * *." The facts are that the sale was arranged by the bankrupt, and on January 10, 1958 the purchasers and the president of the bankrupt came to the Bank in Santa Maria to close the transaction, pay the purchase price, pay off the Bank loan and get a release of the Bank's mortgage. The only "handling" of the transaction performed by the Bank was the receipt of the funds, the making of change, and the release of its lien. [Tr. 29, 35-57.]

2. We do not accept appellant's statement (Br. 4) that the Bank did not at any time record the mortgage in Kern County. The fact was that the mortgage was sent by the Bank to Kern County for recording on January 7, 1958 and returned by the Recorder to the Bank on January 14 or 15, 1958 when the Recorder was informed by the purchaser of the rig that the lien had been satisfied. [Tr. 40-41.] While it is true that the mortgage was never indexed, nor copied into the Kern County records, the mere act of lodging it with the recorder is sufficient in law to constitute a recording.

ARGUMENT.

I.

The District Court Was Correct in Its Conclusion That the Complaint in the First Claim Did Not State a Claim Upon Which Relief Could Be Granted.

a. Assuming for Purposes of Argument That the Mortgage Was Not Recorded in Kern County, Nevertheless at the Time of Payment the Bank Was an Unsecured Creditor Entitled to Be Paid and to Retain the Payment Unless by Some Provision of Federal or State Law the Payment Was Illegal.

We will assume in the first portion of the argument that the mortgage was not recorded in Kern County within thirty days of the removal of the rig to that county and that the bank, after November 8, 1958, lost the benefits of constructive notice under the provisions of Sec. 2965 of the California Civil Code.

The question therefore becomes a simple one:

Can a creditor whose security has become voidable receive and retain payment of his debt in the absence of showing of preference?

The learned District Judge answered this question affirmatively saying [Tr. 42]:

> "The mere fact that the chattel mortgage was void as to creditors does not of itself permit the trustee to recover. Assuming the chattel mortgage to be invalid, the mortgagee was nevertheless an unsecured creditor, and was entitled to payment unless the elements of a preference were present, which claim can be litigated fully under plaintiff's second cause of action."

The trustee argues (Br. 9-13) that Sections 70c and 70e of the National Bankruptcy Act (11 U. S. C. Sec. 110) provide a statutory basis for recovery. But the facts alleged do not bring him within the purview of these Sections. The trustee's power under Section 70c is limited to "property * * * upon which a creditor of the bankrupt could have obtained a lien * * * at the date of bankruptcy".

Turning to the complaint we find that the trustee alleges:

1. The bankrupt was adjudicated March 5, 1958.[1] [Tr. 3.]

2. That the mortgage covering the rig was given by the bankrupt on September 12, 1956 to secure an obligation to the Bank of $37,950. [Tr. 4.]

3. That the rig was moved to Kern County in October, 1957. [Tr. 4.]

4. That the rig was sold by the bankrupt on or about January 10, 1958 for $26,500. [Tr. 5.]

5. That $13,949.25 of the total consideration paid to the bankrupt for the sale of the rig was delivered to the defendant Bank for payment of the balance due on the obligation and in order to secure a release of the mortgage. [Tr. 5.]

6. That the mortgage was never recorded in Kern County. [Tr. 5.]

7. That there are creditors whose claims arose prior to October, 1957 who remain unpaid. [Tr. 5.]

---

[1]This date is immaterially erroneous, the adjudication being February 20, 1958.

It is to be noted that the complaint contains no allegation that the Bank at any time repossessed the rig, foreclosed, or in any manner exercised any dominion over it. Two things are abundantly clear:

(a) As of February 20, 1958 the date of bankruptcy, the rig had, some 40 days earlier, passed into the possession of a bona-fide purchaser for value who had paid cash for it. No creditor on February 20, 1958 could have obtained a lien on the physical property.

(b) The money had been paid to the Bank some 40 days before the adjudication in satisfaction of the obligations then owing to it. In the absence of some agreement to hold it in trust, the money became the property of the Bank and a part of its general assets. No creditor on February 20, 1958 could have obtained a lien on the money.

We conclude that the prerequisite to the applicability of Section 70c to wit: property in existence on the date of bankruptcy as to which a creditor could have obtained a lien, has not been met, and that the complaint does not state a claim for relief under this section. Section 70c is effective only against transfers of encumbrances that are not perfected prior to the date of bankruptcy since the trustee's status as a lien creditor is fixed by the Act as of that date. (*Bailey v. Baker Ice Machine Company,* 239 U. S. 268, 276 (1915); *Martin v. Commercial National Bank,* 245 U. S. 513, 519 (1917); 4 Collier, Bankruptcy, 14th Ed., p. 1405, Sec. 70.48.)

The trustee can take no more comfort from Section 70e which gives the trustee power to avoid a transfer which "under any federal or state law applicable thereto

is fraudulent as against or voidable for any other reason by any creditor of the debtor."

It is fundamental that the trustee's rights in Section 70e are limited to those which a creditor could have enforced. In *Davis v. Willey,* 273 Fed. 397 (C. A. 9, 1921) this court said (p. 400):

> "But under Section 70e heretofore quoted the trustee may void any transfer which any creditor might have voided. This right is conferred upon the trustee to put him in a position to assert a right which the creditor might have possession in suing to set aside a transfer. The trustee is really subrogated. No new rights, no additional remedies, are created for the benefit of the creditor, other than such as the creditor would have had if it had not been for the bankruptcy."

In that case the court held that since a creditor would have been barred by the statute of limitations to set aside a fraudulent transfer, the trustee was also barred. As Professor Collier puts it "Like Prometheus bound, the trustee is chained to the rights of creditors in the bankruptcy proceeding." (4 Collier, Bankruptcy, 14th Ed., Sec. 70.90, pp. 1725-1726.)

Counsel points to no law—federal or state—which renders the transfer of the funds to the Bank either fraudulent or voidable. The mortgage lien as between the bankrupt and the Bank was extinguished by payment on January 10, 1958, and could have no existence for any purpose beyond that date. The avoidance of the mortgage lien provides no basis for recovery of either the property itself or the money paid the Bank.

In effect counsel argues that the mere fact that a mortgage once existed which could have been avoided is

sufficient ground to compel a creditor who has been paid by his debtor to repay to the estate the funds received in discharge of the debt. The law does not go this far. Indeed the limitations upon the trustee's power in this situation are found in the express grant contained in Secs. 60a and 60b of the Bankruptcy Act (11 U. S. C. A. Secs. 96a and 96b) which defines a preferential transfer and gives the trustee power to set one aside if he can prove insolvency and reasonable cause to believe insolvency. If Sections 70c and 70e mean what counsel contends there would be no necessity for Sections 60a and 60b. Presumably Congress has, by the enactment of Sections 60a and 60b, set down the requirements for the avoidance of a preferential transfer and we do not believe that it was within the legislative intent to abrogate these requirements by the adoption of Sections 70c and 70e.

The trustee cites and relies upon *Miller v. Sulmeyer,* 263 F. 2d 513 (C. A. 9, 1959), and *Chapman v. England,* 231 F. 2d 606 (C. A. 9, 1956) but does not discuss the fact situations there involved.

The *Miller* case is distinguishable on its facts from the instant situation. In that case the defendant mortgagee repossessed the mortgaged equipment in December, 1954. The bankruptcy was filed in February, 1955 while the equipment was still in the possession of the mortgagee. Thereafter in March of 1955 the mortgagee sold the equipment. This court reluctantly held that the mortgagee must pay over the proceeds of the sale of the equipment to the trustee.

It seems clear under the facts of the *Miller* case that the equipment was in existence on the date of

bankruptcy and was in the possession of the mortgagee under a voidable mortage.

It follows that in *Miller* the requirements of Section 70c of the Bankruptcy Act were met in that there was property in existence on the date of bankruptcy as to which a creditor could have obtained a lien. In the instant case as has been pointed out, there was no property in existence on the date of bankruptcy as to which a creditor could have obtained a lien.

The same distinction exists with respect to *Noyes v. Bank of Italy,* 206 Cal. 266, 274 Pac. 68 (1929), cited by the appellant at page 12. In the *Noyes* case the bankruptcy was filed August 10, 1923 at a time when the mortgaged property was still in the possession of the mortgagee under the invalid mortgage and the property was not sold by the mortgagee until August 28, 1923. There was therefore property in existence as to which a hypothetical creditor could have obtained a lien on the date of bankruptcy.

In *Chapman v. England,* 231 F. 2d 606, there was in existence at the date of bankruptcy a cause of action against the insurance company which had insured the mortgaged property against loss by fire. On the assumption that the mortgage was void for failure to comply with Section 2965 of the Civil Code as it then existed, a hypothetical creditor as of the date of bankruptcy could have garnished the proceeds of the insurance policy as of the date of bankruptcy and thereby obtained a lien. Thus the requirements of Section 70c were also met in *Chapman v. England,* but they were not met in the instant case.

It is to be noted that following the decision in *Chapman v. England* the California Legislature amended Sec-

tion 2965 of the Civil Code deleting the provision that property removed from the county of recordation for longer than 30 days was "exempted from the operation of the mortgage except as between the parties thereto." The 1957 amendment substituted as a penalty for failure to record in the county of removal a provision that "recordation shall not impart constructive notice while said property remains removed from the county * * * *Until* the mortgagee takes possession of the property as prescribed in the next section (Sec. 2966)".

By this amendment the legislature expressed an intent to override the drastic rule of *Chapman v. England* and to impair the validity of the mortgage only to the extent stated to wit: to deprive the mortgagee of the advantages of constructive notice *until* certain requirements were met. It would seem to follow from the 1957 amendment to Section 2965 that if the Bank had repossessed the equipment on January 10, 1958 the mortgage would after that date no longer be subject to attack and no creditor could have obtained a lien upon the mortgaged property as of the date of bankruptcy in February. We conclude that since the Bank would have had a right to repossess the equipment on January 10 and to sell it to satisfy the debt, it also had the right to receive and retain voluntary payment of the debt on that date.

It is to be noted that *Noyes v. Bank of Italy,* 206 Cal. 266, and *Miller v. Sulmeyer,* 263 F. 2d 513, both arose under the provisions of Section 2957 of the California Civil Code rather than under Section 2965. Where the invalidity arises under Section 2965, as amended, the taking of possession by the mortgagee prior to bank-

ruptcy removes the defect. It seems to follow that if *Noyes v. Bank of Italy* and *Miller v. Sulmeyer* had arisen under Section 2965, as amended, the results in both cases would have been different.

We do not quarrel with counsel's discussion of the rules and principals involved in *Moore v. Bay,* 284 U. S. 4, and *In re Sassard & Kimball,* 45 F. 2d 449 (C. A. 9, 1930), nor with the cases cited at page 8 of Appellant's Brief, but we do not believe that these cases help the appellant to fulfill his obligation to demonstrate that the payment of the debt to the Bank on January 10, 1958 constituted the illegal transfer of assets. In each of the cases cited on page 8 of the Appellant's Brief the trustee was seeking to invalidate a security transfer of property on some recognized ground. Our attack upon the pleading admits the invalidity of the mortgage, but we take the position that even though the mortgage may be invalid this does not prevent the mortgagee from discharging his unsecured obligation which remains unimpaired.

The same analysis applies to *Chelhar v. The Acme Garage,* 18 Cal. App. 2d 775, 61 P. 2d 1232, cited at page 12 of the Appellant's Brief. In *Chelhar* the court simply held that as between a purchaser of property at foreclosure sale and an execution creditor of the mortgagor the execution creditor prevailed where the purchaser failed to comply with the provisions of the California Vehicle Code. We fail to see the applicability of this decision here.

b. The Chattel Mortgage Was in Legal Effect Recorded in Kern County on the Date It Was Received in the County Recorder's Office on January 8, 1958.

The Affidavit of F. W. Shields discloses that on January 7, 1958 the mortgage was sent to the County Recorder of Kern County with a request that the mortgage be recorded in that county. [Tr. 40.] In the normal course of events it would be received on January 8, 1958 at Bakersfield.

Section 1170 of the California Civil Code provides that an instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the Recorder's Office with the proper officer for record. In *Meherin v. Oaks,* 67 Cal. 57, 7 Pac. 47 (1885), Supreme Court held that a chattel mortgage is deemed to be recorded within the meaning of Section 2957 of the Civil Code when it is deposited in the Recorder's Office with the proper officer for record. It was argued that it was encumbent upon the chattel mortgagee to see to it not only that the instrument was properly executed but that it was properly indexed and placed in the record books. The court rejected this contention, stating (p. 58):

> "The mortgage, properly executed, having been deposited in the Recorder's Office with the proper officer for record, the mortgagee had done all that the law required him to do."

Other jurisdictions uniformly follow the rule that an instrument is in legal effect deemed recorded when left with the recorder. (*Chandler v. Scott,* 127 Ind. 226,

26 N. E. 297 (1891); *Jordan v. Farnsworth,* 81 Mass. (15 Gray) 517 (1896); *Bishop v. Cook,* 13 Barb. (N. Y.) 326 (1850); *Parker v. Palmer,* 13 R. I. 359 (1881); *Eastman v. Parkinson,* 133 Wisc. 375, 390, 113 N. W. 639 (1907); *Appleton Mill Co. v. Warder,* 42 Minn. 117, 43 N. W. 791 (1889); *Blair v. Richey,* 72 Vt. 311, 42 Atl. 1074 (1900).)

It is clear from these cases that a chattel mortgage is deemed recorded for the purpose of giving notice to third parties when it is delivered to, received by, and kept by the proper officer in his office for the purpose of filing, notwithstanding that he omits to place it with the other chattel mortgages in his office or that he omits to index it or to properly place it in the record book.

Since the physical act of lodging the mortgage with the Recorder constitutes an effective recording in Kern County, the provisions of Section 2965, subdivision 1 are applicable, and the mortgage from and after January 8, 1958, the date of receipt in the County Recorder's Office, imparted constructive note. The Statute says that "Recordation [in Santa Barbara County] shall not impart constructive notice while said property remains removed from the county: 1—Until the mortgagee causes the mortgage to be recorded in the county to which the property has been removed". It follows that on January 10, 1958, the date the $13,949.25 was paid to the Bank, the mortgage was perfectly valid.

Conclusion.

Whether or not the mortgage was validly recorded in Kern County at the time the payment was received by the Bank the first claim does not state facts upon which relief can be granted because there was no property in existence on the date of bankruptcy as to which a hypothetical creditor could have obtained a lien. The mortgage was validly recorded in Kern County on January 8 when it was lodged with the Kern County Recorder and the mortgage was therefore not subject to attack.

The decision of the District Court was clearly correct and should be affirmed.

Respectfully submitted,

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ROBERT H. FABIAN,
Attorneys for Appellee.

No. 17039

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Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

WILLIAM J. TIERNAN,
215 West 7th Street,
Los Angeles 14, California,

For Appellee:

HUGO A. STEINMEYER,
ROBERT H. FABIAN,
650 South Spring Street,
Los Angeles 14, California,

In the United States District Court Southern District of California, Central Division

Civil No. 695-58BH

A. E. MALLAGH, Trustee in Bankruptcy of the Bankrupt Estate of ORVILLE STANFORD, INC.,

Plaintiff,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION A National Banking Institution

Defendant.

ACTION TO RECOVER PROCEEDS PAID UNDER A VOID MORTGAGE AND TO RECOVER A PREFERANCE

First Claim

I

Plaintiff alleges that plaintiff is the duly appointed, qualified and acting Trustee in Bankruptcy of the bankrupt estate of Orville Stanford, Inc., a California corporation. That said bankrupt was duly adjudicated a bankrupt upon a voluntary petition filed by said bankrupt in the above-entitled judicial district on March 5, 1958. That said proceedings were thereupon duly referred to the Honorable Ronald L. Walker, Referee in Bankruptcy for all further proceedings and said case and proceedings are numbered 85421-HW.

II

That jurisdiction is conferred upon this court by the provisions of Section 60 and Section 70 of the Bankruptcy Act as amended (United States Code, Title 11,

Chapt. 6, Sec. 96) and (United States Code, Title 11, Chapter 7, Sec. 110)

III

That the defendant, Bank of America National Trust and Savings Association, is a national banking institution, qualified to do and actually doing business within the above-entitled judicial district.

IV

That on or about September 12, 1956, the bankrupt herein made, executed and delivered to the defendant a certain Mortgage of Chattels a true exact copy of which is attached to this complaint, made a part hereof by reference and marked, "Exhibit A." That the aforesaid Mortgage of Chattels was given to the defendant herein to secure an obligation referred to in the body of said Exhibit A, to wit, a certain obligation dated September 12, 1956, in the amount of $37,950.00. That the aforesaid Chattel Mortgage referred to herein as Exhibit A covers personal property consisting of a portable drilling rig used for drilling oil wells and other type of wells together with equipment and accessories used in drilling operations and used in connection with the rig itself.

V

That thereafter the aforesaid personal property referred to in the aforesaid chattel mortgage was removed by the bankrupt to Kern County in the vicinity of Bakersfield on or about the month of October, 1957. That

the aforesaid personal property covered by the aforesaid chattel mortgage remained in Kern County in the vicinity of Bakersfield until the equipment was sold by the bankrupt on or about January 10, 1958, for a total consideration of $26,500.00. That of the total consideration paid to the bankrupt concern for the sale of the personal property referred to the sum of $13,949.25 was delivered to the defendant herein in order to secure a release of the mortgage of chattels referred to as Exhibit A and as and for payment of the balance due upon the obligation referred to as being secured by the said Exhibit A.

VI

That although the aforesaid personal property was removed to Kern County from Santa Barbara County during the month of October, 1957, neither the bankrupt nor the mortgagee, the defendant herein, ever recorded said mortgage in Kern County or in any other county than Santa Barbara. That further, neither the bankrupt herein nor the defendant herein, nor any other person filed a statement with the Secretary of State in accordance with the provisions of Section 2965 of the Civil Code of the State of California.

VII

That said mortgage was and is void as to the plaintiff herein and as to the creditors of the bankrupt estate of Orville Stanford, Inc. That there are creditors in existence whose claims arose prior to the month of October, 1957, whose claims remain presently unpaid.

VIII

That this plaintiff is entitled to the proceeds or moneys paid to the defendant herein in the sum of $13,-949.25.

IX

That on or about June 11, 1958, plaintiff herein through his counsel made written demand upon the defendant herein for the return of the sum of $13,949.25. That although demanded, the defendant herein has failed, neglected and refused to return said sum or any part thereof.

Second Claim:

I

Plaintiff herein repeats and realleges with full force and effect as though fully set forth all of the allegations contained in Paragraphs I through VIII of the first claim.

II

That at the time the defendant herein was paid the sum of $13,949.25 to wit, the bankrupt concern, towit, Orville Stanford, Inc., was insolvent; i.e., its assets at a fair marketable valuation thereof were insufficient to pay the general unsecured obligations to its creditors.

III

That by transferring the foregoing proceeds to the defendant herein the defendant was permitted to acquire a preference and an advantage over all the other general unsecured creditors as well as to acquire a greater percentage or portion of its obligation than other creditors.

That said transfer constitutes a preference voidable under Section 60 of the Bankruptcy Act.

IV

That the foregoing payments and/or transfer was made within four months of the filing of the petition in these proceedings said petition having been filed on March 5, 1958.

V

That the defendant, Bank of America National Trust and Savings Association, had reasonable cause to believe that the bankrupt herein was insolvent at the time of the foregoing transfer on or about January 10, 1958.

Wherefore plaintiff prays judgement as follows against the defendant:

1. For the sum of $13,949.25 together with interest as allowed by law from June 11, 1958.
2. For costs of suit incurred.
3. For such other relief as may be just.

/s/ A. E. MALLAGH,
Plaintiff

Duly verified.

[Endorsed]: Filed July 17, 1958.

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant Bank of America National Trust and Savings Association and for answer to the complaint of the plaintiff in the above-entitled action admits, denies and alleges as follows:

For Answer To The First Claim:

1.

For answer to Paragraphs I, II, III, IV and IX thereof admits the allegations therein contained.

2.

For answer to Paragraph V thereof admits that the personal property referred to therein was removed by the bankrupt to Kern County some time after September 12, 1956; further answering said paragraph defendant has no information or belief sufficient to enable it to answer the allegation contained therein with respect to the time of said removal and basing its denial on this ground denies the allegation that the said property was removed in or about the month of October, 1957; further answering said paragraph defendant has no information or belief sufficient to enable it to answer the allegation therein contained to the effect that the aforesaid personal property remained in Kern County in the vicinity of Bakersfield until on or about January 10, 1958 and basing its denial on this ground denies said allegation; further answering said paragraph defendant admits that the said personal peroperty was sold on or about January 10, 1958 to Knight Drilling Company and Amazon Supply Company; further answering said paragraph defendant has no information or belief sufficient to enable it to answer the allegation

therein contained that said property was sold for a total consideration of $26,500, and basing its denial on this ground denies said allegation; further answering said paragraph defendant denies that the sum of $13,949.25 was paid by Knight Drilling Company and Amazon Supply Company, the purchasers of said property to the bankrupt concern and in this connection defendant alleges that the said sum of $13,949.25 was paid by the said Knight Drilling Company and Amazon Supply Company to the defendant in consideration for an in exchange for a release of the mortgage of chattels referred to in Paragraph IV of the complaint and that said sum, upon receipt, was applied upon the outstanding indebtedness of Orville Stanford, Inc. to the defendant Bank; further answering said paragraph defendant admits the allegation therein contained that said sum of $13,949.25 was delivered to the defendant in order to secure a release of the mortgage of chattels referred to as Exhibit A and in order to discharge the balance due upon the obligation referred to as being secured by the said Exhibit A.

3.

For answer to Paragraph VI defendant alleges that it has no information or belief sufficient to enable it to answer the allegation therein contained with respect to the date of removal of the said personal property to Kern County from Santa Barbara County and basing its denial on this ground denies said allegation; further answering said paragraph defendant admits the remainder of the allegations therein contained.

4.

For answer to Paragraph VII defendant has no information or belief sufficient to enable it to answer the allegations contained in the second sentence of said paragraph with respect to the existence of creditors whose claims remain unpaid and basing its denial on this ground denies said allegation; further answering said paragraph defendant denies generally and specifically the remainder of the allegations therein contained.

5.

For answer to Paragraph VIII defendant denies the allegations therein contained.

For Answer To The Second Claim:

6.

For answer to Paragraph I thereof defendant repeats and incorporates by reference as though set out at this point in full its answers to the allegations contained in Paragraphs I through VIII of the First Claim.

7.

For answer to Paragraph II thereof defendant has no information or belief sufficient to enable it to answer the allegations therein contained and basing its denial on this ground denies said allegations.

8.

For answer to Paragraphs III and V thereof defendant denies the allegations therein contained.

9.

For answer to Paragraph IV defendant admits the allegations therein contained.

Wherefore, defendant prays:

1. Plaintiff take nothing by this action;

2. For its costs of suit; and

3. For such other and further relief as the court may deem just.

HUGO A. STEINMEYER and
ROBERT H. FABIAN,
/s/ By ROBERT H. FABIAN,
Attorneys for Defendant

Duly Verified.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Sept. 26, 1958.

[Title of District Court and Cause.]

WRITTEN INTERROGATORY TO PLAINTIFF
(F.R.C.P. Rule 33)

To: A. E. Mallagh, Trustee, Plaintiff, And To William J. Tiernan, His Attorney:

Defendant submits the following interrogatories pursuant to Rule 33, F. R. C. P. and requests that said interrogatories be answered separately and fully in writing under oath within fifteen (15) days after the service of said interrogatories, in accordance with said Rule 33:

Interrogatory No. 1: What are the names and addresses of witnesses expected to be called by plaintiff to testify to the alleged fact that the defendant, on January 10, 1958, had reasonable cause to believe Orville Stanford, Inc. was then insolvent.

Interrogatory No. 2: What are the names and addresses of the witnesses expected to be called by plaintiff to testify to the alleged fact that Orville Stanford, Inc. was actually insolvent on January 10, 1958.

Interrogatory No. 3: What is the name of the officer or employe or agent of the defendant Bank alleged to have had reasonable cause to believe that the bankrupt was insolvent on January 10, 1958?

Interrogatory No. 4: What are the names of creditors of Orville Stanford, Inc. who could have on February 20, 1958, the date of bankruptcy, obtained a lien upon the proceeds of the sale of the drilling rig mentioned in the complaint?

Interrogatory No. 5: Describe generally the property of the bankrupt upon which plaintiff contends a creditor existing on February 20, 1958 could have then obtained a lien.

Interrogatory No. 6: Upon what date was the drilling rig mentioned in the complaint removed from Santa Barbara County to Kern County?

Interrogatory No. 7: What is the name of the person, firm or corporation which accomplished the removal of the said drilling rig from Santa Barbara County to Kern County?

Interrogatory No. 8: Did any property of the bankrupt pass into defendant's possession on January 10, 1958?

Interrogatory No. 9: If the answer to Interrogatory No. 8 is Yes, describe said property.

Interrogatory No. 10: Did any money of the bankrupt pass into defendant's possession on January 10, 1958?

Interrogatory No. 11: Did the bankrupt on January 10, 1958 or within 30 days prior thereto furnish information to the Bank regarding the extent of its assets?

Interrogatory No. 12: Did the bankrupt on January 10, 1958 or within 30 days prior thereto furnish information to the Bank regarding the extent of its liabilities?

Interrogatory No. 13: Did the bankrupt furnish information to the defendant on January 10, 1958 or at any time, to the effect that its liabilities exceeded its assets?

Interrogatory No. 14: If the answer to Interrogatory No. 11 is yes, was such information furnished orally or in writing?

Interrogatory No. 15: If the answer to Interrogatory No. 12 is yes, was such information given orally or in writing?

Interrogatory No. 16: If the answer to Interrogatory No. 13 is yes, was such information given orally or in writing?

Interrogatory No. 17: If any of the answers to Interrogatories Numbered 14, 15 and 16 are that the information was furnished in writing, please attach a copy of said writing.

Interrogatory No. 18: If the answers to any of the Interrogatories Numbered 14, 15 and 16 are that the information was given orally, state the name of the officer, employe or agent of the defendant to whom the information was allegedly given.

Interrogatory No. 19: Did anyone on January 10, 1958 or within 30 days prior thereto furnish information to the Bank regarding the extent of the bankrupt's assets?

Interrogatory No. 20: If the answer to Interrogatory No. 19 is yes, state the name of the person furnishing the information.

Interrogatory No. 21: Did anyone on January 10, 1958 or within 30 days prior thereto furnish information to the defendant regarding the extent of the bankrupt's liabilities?

Interrogatory No. 22: If the answer to Interrogatory No. 21 is yes, state the name of the person furnishing such information.

Interrogatory No. 23: Did anyone on January 10, 1958 or at any time prior to February 20, 1958 furnish information to the defendant that the liabilities of the bankrupt exceeded its assets?

Interrogatory No. 24: If the answer to Interrogatory No. 23 is yes, state the name of the person furnishing said information.

Interrogatory No. 25: If the answers to any of the Interrogatories Numbered 19, 21 or 23 are yes, was such information furnished orally or in writing?

Interrogatory No. 26: If the answer to Interrogatory No. 25 is that the information was furnished in writing, attach a copy of said writing.

Interrogatory No. 27: If the answer to Interrogatory No. 25 is that the information was furnished orally, state the name of the officer, employe or other agent of the defendant to whom the information was given.

Dated this 5th day of November, 1958.

HUGO A. STEINMEYER and
ROBERT H. FABIAN,
/s/ By ROBERT H. FABIAN,
Attorneys for Defendant

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Nov. 6, 1958.

[Title of District Court and Cause.]

FIRST AMENDED ANSWER

Comes now the defendant Bank of America National Trust and Savings Association and for answer to the complaint of the plaintiff in the above-entitled action admits, denies and alleges as follows:

For Answer to the First Claim:

1.

For answer to Paragraphs I, II, III, IV and IX thereof admits the allegations therein contained.

2.

For answer to Paragraph V thereof defendant admits that the personal property referred to therein was removed from Santa Barbara County to Kern County on October 8, 1957; further answering said paragraph defendant admits that the aforesaid personal property remained in Kern County in the vicinity of Bakersfield until on or about January 10, 1958; further answering said paragraph defendant admits that the said personal property was sold on or about January 10, 1958 to Knight Drilling Company and Amazon Supply Company; further answering said paragraph defendant has no information or belief sufficient to enable it to answer the allegation therein contained that said property was sold for a total consideration of $26,500, and basing its denial on this ground denies said allegation; further answering said paragraph defendant denies that the sum of $13,949.25 was paid by Knight Drilling Company and Amazon Supply Company, the purchasers of said property to the bankrupt concern and in this connection defendant alleges that the said sum of $13,949.25 was paid by the said Knight Drilling Com-

pany and Amazon Supply Company to the defendant in consideration for and in exchange for a release of the mortgage of chattels referred to in Paragraph IV of the complaint and that said sum, upon receipt, was applied upon the outstanding indebtedness of Orville Stanford, Inc. to the defendant Bank; further answering said paragraph defendant admits the allegation therein contained that the sum of $13,949.25 was delivered to the defendant in order to secure a release of the mortgage of chattels referred to as Exhibit A and in order to discharge the balance due upon the obligation referred to as being secured by the said Exhibit A.

3.

For answer to Paragraph VI defendant admits that said personal property was removed to Kern County from Santa Barbara County on October 8, 1957 and that the said mortgage was not filed with the Secretary of State of California; further answering said paragraph defendant denies the remainder of the allegations therein contained.

4.

For answer to Paragraph VII defendant has no information or belief sufficient to enable it to answer the allegations contained in the second sentence of said paragraph with respect to the existence of creditors whose claims remain unpaid and basing its denial on this ground denies said allegation; further answering said paragraph defendant denies generally and specifically the remainder of the allegations therein contained.

5.

For answer to Paragraph VIII defendant denies the allegations therein contained.

For answer to the second claim:

6.

For answer to Paragraph I thereof defendant repeats and incorporates by reference as though set out at this point in full its answers to the allegations contained in Paragraphs I through VIII of the First Claim.

7.

For answer to Paragraph II thereof defendant has no information or belief sufficient to enable it to answer the allegations therein contained and basing its denial on this ground denies said allegations.

8.

For answer to Paragraphs III and V thereof defendant denies the allegations therein contained.

9.

For answer to Paragraph IV defendant admits the allegations therein contained.

Wherefore, defendant prays:

1. Plaintiff take nothing by this action;

2. For its costs of suit; and

3. For such other and further relief as the court may deem just.

HUGO A. STEINMEYER and
ROBERT H. FABIAN,
/s/ By ROBERT H. FABIAN,
Attorneys for Defendant

Duly Verified.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Nov. 10, 1958.

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORY TO PLAINTIFF (F.R.C.P. Rule 33)

Interrogatory No. 1: What are the names and addresses of witnesses expected to be called by plaintiff to testify to the alleged fact that the defendant on January 10, 1958, had reasonable cause to believe Orville Stanford, Inc. was then insolvent.

Answer to No. 1: Orville Stanford, Columbia, South America (c/o Drilling and Exploration Company, Inc., Columbian Division, Cartagena, Columbia, South America); Mr. Roy E. Mitchell, 1731-28th Street, Bakersfield, California; Mr. Frank Shields, Manager, Bank of America, Santa Maria, California.

The names and addresses of other witnesses are presently unknown to the plaintiff because plaintiff has not taken the deposition of the defendant, nor the deposition of Orville Stanford, President of the bankrupt concern.

Interrogatory No. 2: What are the names and addresses of the witnesses expected to be called by plaintiff to testify to the alleged fact that Orville Stanford, Inc., was actually insolvent on January 10, 1958.

Answer to No. 2: Orville Stanford, Columbia, South America; Roy E. Mitchell, Bakersfield, California.

Interrogatory No. 3: What is the name of the officer or employe or agent of the defendant Bank alleged to have had reasonable cause to believe that the bankrupt was insolvent on January 10, 1958?

Answer to No. 3: Frank Shields, Manager.

The names of other witnesses, officers, employes and agents of the defendant bank is presently unknown since plaintiff has had no opportunity to take the deposition of the defendant at this time.

Interrogatory No. 4: What are the names of creditors of Orville Stanford, Inc. who could have on February 20, 1958, the date of bankruptcy, obtained a lien upon the proceeds of the sale of the drilling rig mentioned in the complaint?

Answer to No. 4: The creditors of Orville Stanford, Inc. are a matter of public record and the complete list with addresses are on file in those certain proceedings in this district entitled, "In the Matter of Orville Stanford, Inc., No 85421-HW."

Interrogatory No. 5: Describe generally the property of the bankrupt upon which plaintiff contends a creditor existing on February 20, 1958, could have then obtained a lien.

Answer to No. 5: A certain oil drilling rig, and other type of equipment or the proceeds from the sale thereof.

Interrogatory No. 6: Upon what date was the drilling rig mentioned in the complaint removed from Santa Barbara County to Kern County?

Answer to No. 6: According to the first amended answer on file the rig was removed from Santa Barbara County to Kern County on or about October 8, 1957.

Interrogatory No. 7: What is the name of the person, firm or corporation which accomplished the removal of the said drilling rig from Santa Barbara County to Kern County?

Answer to No. 7: Green and Dredlow.

Interrogatory No. 8: Did any property of the bankrupt pass into defendant's possession on January 10, 1958?

Answer to No. 8: The answer to this question is presently unknown since plaintiff has not had an opportunity to take the deposition of the defendant and/or Orville Stanford, president of the bankrupt concern.

Interrogatory No. 9: If the answer to Interrogatory No. 8 is Yes, describe said property.

Answer to No. 9: See answer to No. 8.

Interrogatory No. 10: Did any money of the bankrupt pass into defendant's possession on January 10, 1958?

Answer to No. 10: Yes, a check from Knight Drilling Company in the amount of $9,000.00 and a check from Amazon Supply Company in the amount of $17,500.00.

Interrogatory No. 11: Did the bankrupt on January 10, 1958, or within 30 days prior thereto furnish information to the Bank regarding the extent of its assets?

Answer to No. 11: The information called for is within the knowledge of the defendant and Orville Stanford, Plaintiff is unable to answer this question because plaintiff has not had an opportunity to take the deposition of either as of this date.

Interrogatory No. 12: Did the bankrupt on January 10, 1958, or within 30 days prior thereto furnish information to the Bank regarding the extent of its liabilities?

Answer to No. 12: See answer to No. 11.

Interrogatory No. 13: Did the bankrupt furnish information to the defendant on January 10, 1958, or at any time, to the effect that its liabilities exceeded its assets?

Answer to No. 13: See answer to Interrogatory No. 11.

Interrogatory No. 14: If the answer to Interrogatory No. 11 is yes, was such information furnished orally or in writing?

Answer to No. 14: See answer to Interrogatory No. 11.

Interrogatory No. 15: If the answer to Interrogatory No. 12 is yes, was such information given orally or in writing?

Answer to No. 15: See answer to Interrogatory No. 11.

Interrogatory No. 16: If the answer to Interrogatory No. 13 is yes, was such information given orally or in writing?

Answer to No. 16: See answer to Interrogatory No. 11.

Interrogatory No. 17: If any of the answers to Interrogatories Numbered 14, 15 and 16 are that the information was furnished in writing, please attach a copy of said writing.

Answer to No. 17: See answer to Interrogatory No. 11.

Interrogatory No. 18: If the answers to any of the Interrogatories numbered 14, 15 and 16 are that the information was given orally, state the name of the officer, employe or agent of the defendant to whom the information was allegedly given.

Answer to No. 18: See answer to Interrogatory No. 11.

Interrogatory No. 19: Did anyone on January 10, 1958, or within 30 days prior thereto furnish information to the Bank regarding the extent of the bankrupt's assets?

Answer to No. 19: See answer to Interrogatory No. 11.

Interrogatory No. 20: If the answer to Interrogatory No. 19 is yes, state name of the person furnishing the information.

Answer to No. 20: See answer to Interrogatory No. 11.

Interrogatory No. 21: Did anyone on January 10. 1958, or within 30 days prior thereto furnish information to the defendant regarding the extent of the bankrupt's liabilities?

Answer to No. 21: See answer to Interrogatory No. 11.

Interrogatory No. 22: If the answer to Interrogatory No. 21 is yes, state the name of the person furnishing such information.

Answer to No. 22: See answer to Interrogatory No. 11.

Interrogatory No. 23: Did anyone on January 10, 1958, or at any time prior to February 20, 1958 furnish information to the defendant that the liabilities of the bankrupt exceeded its assets?

Answer to No. 23: See answer to Interrogatory No. 11.

Interrogatory No. 24: If the answer to Interrogatory No. 23 is yes, state the name of the person furnishing said information.

Answer to No. 24: See answer to Interrogatory No. 11.

Interrogatory No. 25: If the answers to any of the Interrogatories Numbered 19, 21 or 23 are yes, was such information furnished orally or in writing?

Answer to No. 25: See answer to Interrogatory No. 11.

Interrogatory No. 26: If the answer to No. 25 is that the information was furnished in writing, attach a copy of said writing.

Answer to No. 26: See answer to No. 11.

Interrogatory No. 27: If the answer to Interrogatory No. 25 is that the information was furnished orally, state the name of the officer, employe or other agent of the defendant to whom the information was given.

Answer to No. 27: See answer to Interrogatory No. 11.

Dated: November 18, 1958.

/s/ WILLIAM J. TIERNAN,
Attorney for Plaintiff

Duly Verified.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Nov. 26, 1958.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY JUDGMENT

To the Defendant, Bank of America National Trust and Savings Association and to Their Attorneys, Hugo A. Steinmeyer and Robert H. Fabian:

You and Each of You Will Please Take Notice that the undersigned will as attorney for the plaintiff herein move the above-entitled Court for summary judgment in accordance with Rule 56 of the Federal Rules of Civil Procedure and the local Rules of this District.

You Will Further Take Notice that said motion will be made and will be heard before the above-entitled Court on the 15th day of February, 1960, at the hour of 10 A.M. or as soon thereafter as said motion may be heard. Said motion will be made and will be heard the Honorable Peirson Hall, Judge of the above-entitled Court at his chambers in the Federal Building, Temple and Spring Streets, Los Angeles, California.

Said motion will be made and will be based upon this Notice of Motion, the Affidavit in Support of the Motion for Summary Judgment, the Memorandum of Points and Authorities filed concurrently herewith, the proposed Findings of Fact and Conclusions of Law and Order filed concurrently herewith and upon all the records and files of this proceeding.

Dated: This 3 day of February, 1960.

/s/ WILLIAM J. TIERNAN,
Attorney for the Plaintiff

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

State of California County of Los Angeles—ss.

William J. Tiernan, being first duly sworn deposes and says:

I

That affiant is an attorney at law and is the attorney for the plaintiff herein and affiant makes this affidavit based upon facts within his own knowledge, as well as facts which are admitted in the pleadings on file herein Affiant, if sworn as a witness, could competently testify as to the matters set forth herein.

II

That this affidavit applies only to the first cause of action and is offered only to establish the facts as set forth in the first cause of action or claim.

III

That plaintiff herein is the duly appointed, qualified and acting Trustee in Bankruptcy of the bankrupt estate of Orville Stanford, Inc., a California corporation. That a voluntary petition in bankruptcy was filed in the above-entitled judicial district on or about February 20, 1958.

That thereafter, the proceedings were referred to the Honorable Referee in Bankruptcy, Ronald A. Walker and were numbered 85421-HW. That at the first meeting of creditors, A. E. Mallagh, the plaintiff herein, was appointed Trustee,and thereafter, the said A. E. Mallagh, qualified as such and is now and ever has been acting as Trustee of the bankrupt estate referred to. These facts are admitted in the pleadings.

IV

That on or about September 12, 1956, the bankrupt herein made, executed and delivered to the defendant, a certain Mortgage of Chattels, a true exact copy of which is attached to this affidavit, made a part hereof by reference and marked, "Exhibit A". That the aforesaid Mortgage of Chattels was given to the defendant herein to secure an obligation referred to in the body of said Exhibit A, to-wit a certain obligation dated September 12, 1956, in the amount of Thirty-seven Thousand Nine Hundred and Fifty Dollars ($37,950.00). That the aforesaid Chattel Mortgage referred to herein as Exhibit A, covers personal property consisting of a readily portable drilling rig used for drilling oil wells, together with equipment and accessories used in drilling operations and used in connection with the rig itself. The Mortgage was recorded in Santa Barbara County.

V

Thereafter, and on or about October 8, 1957, the oil drilling equipment was removed to Kern County by the bankrupt in the vicinity of Bakersfield under an agreement with Green & Dredlaw for its use. That the aforesaid personal property covered by the aforesaid Chattel Mortgage remained in Kern County in the vicinity of Bakersfield until the equipment was sold by the bankrupt on or about January 10, 1958, for a total consideration of Twenty Six Thousand Five Hundred Dollars ($26,500.00). That the sum of Thirteen Thousand Nine Hundred and Fifty-nine Dollars and Twenty-five Cents ($13,959.25) was paid to the defendant herein in order to secure a release of the Mortgage of Chattels referred to as Exhibit A and as and for payment of

the balance due upon the obligation referred to as being secured by the said Exhibit A. That attached hereto, marked Exhibit B is a copy of a letter written by the Bank of America, Santa Maria Branch, showing the sales price and deductions made by the defendant in connection with the sale of the drilling rig referred to.

VI

That although the aforesaid personal property was removed to Kern County from Santa Barbara County during the month of October, 1957, and remained in said County, neither the bankrupt nor the mortgagee, the defendant herein, ever recorded said Mortgage in Kern County or in any other County than Santa Barbara. That further, neither the bankrupt herein nor the defendant herein, nor any other person filed a statement with the Secretary of State in accordance with the provisions of Section 2965 of the Civil Code of the State of California.

VII

That there are creditors in existence whose claims arose during the interval or prior to the time that the personal property was removed to Kern County on October 8, 1957. These same said creditors remained unpaid as of the date of bankruptcy and these same said creditors have filed in the bankruptcy proceedings, their general unsecured claims. That amongst the creditors of the bankrupt whose claim preceded the removal of the aforesaid personal property from Santa Barbara to Kern County on October 8, 1957, is the Republic Supply Company of California. The bankrupt concern is and was obligated to the Republic Supply Company of California in the amount of Forty-two Thousand Six Hundred and Sixty-one Dollars and Sixteen Cents

($42,661.16) based upon a judgment rendered in the Superior Court in and for the County of Los Angeles in that certain case entitled, Republic Supply Company of California vs. Orville Stanford, Inc. No. 692068. That the said Republic Supply Company of California has filed a general unsecured claim as a creditor.

VIII

That on or about June 11, 1958, affiant herein, acting as attorney for the plaintiff herein, made a written demand upon the defendant, Bank of America, for the return of the sum of Thirteen Thousand Nine Hundred and Forty-nine Dollars and Twenty-five Cents ($13,949.25). That the defendant herein has failed, neglected and refused to return the said sum of money or any part thereof.

Further affiant sayeth not.

Dated: This 18 day of January, 1960.

/s/ WILLIAM J. TIERNAN,
Affiant

Subscribed and sworn to before me this 18 day of January, 1960.

[Seal]

/s/ EDWIN D. LASKER,
Notary Public in and for the County of Los Angeles, State of California

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Feb. 3, 1960.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

State of California, County of Los Angeles—ss.

Robert H. Fabian, being first duly sworn, deposes and says: that he is one of the attorneys for the defendant Bank of America National Trust and Savings Association and authorized to make oath on its behalf; that the facts set forth in this affidavit are known to the affiant and if sworn he could testify competently thereto; that on January 10, 1958 the bankrupt, Orville Stanford, Inc., sold and delivered to Knight Drilling Company and Amazon Supply Company of Bakersfield, California the drilling rig and equipment which is the subject of the mortgage attached to the affidavit of William J. Tiernan filed herein; that Orville Stanford, Inc. executed and delivered on January 10th a bill of sale on said equipment and possession of said equipment was on January 10, 1958 or even a few days thereafter, taken by the said purchasers; that at no time did the Bank of America or any of its agents or employees take physical possession of said equipment; that on January 10, 1958 the defendant received from the representatives of Knight Drilling Company and Amazon Supply Company, at a conference at which Orville Stanford, the president of the bankrupt was present, two checks in the sum of $9,000 and $17,500 respectively; that on said date the Bank credited upon the loan obligations of Orville Stanford, Inc. to the Bank

the sum of $13,949.25; that the sum so credited thereupon became part of the general assets of the Bank and that said funds were in no way segregated from the other general assets of the Bank; that on February 20, 1958 the date of Bankruptcy, there was no property of the bankrupt in the hands of or in the possession of the defendant Bank upon which a creditor of the bankrupt could have obtained a lien.

Dated this 8th day of February, 1960.

/s/ ROBERT H. FABIAN

Subscribed and sworn to before me this 8th day of February, 1960.

[Seal] /s/ JEAN SUINESS,
Notary Public in and for said County and State.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Feb. 9, 1960.

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS COMPLAINT

To William J. Tiernan, Attorney for the Plaintiff:

Please Take Notice that the undersigned will bring the above motion on for hearing before this Court before the Honorable Peirson Hall, District Judge, United States Courthouse and Post Office Building, Temple and Spring Streets, Los Angeles, California on the 15th day of February, 1960 at the hour of 10:00 A.M. in

the forenoon of that day or as soon thereafter as counsel can be heard.

Dated this 8th day of February, 1960.

HUGO A. STEINMEYER,
ROBERT H. FABIAN and
HARRIS B. TAYLOR,
/s/ By HARRIS B. TAYLOR,
Attorneys for Defendant

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Feb. 9, 1960.

[Title of District Court and Cause.]

MOTION TO DISMISS COMPLAINT

The defendant Bank of America National Trust and Savings Association moves the Court as follows:

1. To dismiss the first claim contained in the complaint of the plaintiff because said complaint in the first claim fails to state a claim against defendant upon which relief can be granted.

The foregoing motion will be based upon the papers, records and files in this proceeding and the Points and Authorities filed herewith.

Dated this 8th day of February, 1960.

HUGO A. STEINMEYER,
ROBERT H. FABIAN and
HARRIS B. TAYLOR,
/s/ By HARRIS B. TAYLOR,
Attorneys for Defendant

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Feb. 9, 1960.

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

State of California, County of Los Angeles—ss.

Robert H. Fabian, being first duly sworn deposes and says: That he is one of the attorneys for Bank of America National Trust and Savings Association and authorized to make oath on its behalf; that the chattel mortgage which is attached to the complaint in the within action was mailed by the defendant to the County Recorder of Kern County with a request that said mortgage be recorded on January 7, 1958; that said mortgage was returned to the defendant by mail by the County Recorder on or about January 11, 1958; that on or about January 11, 1958 one Elmo Knight visited the County Recorder's office of Kern County for the purpose of recording a satisfaction of the aforesaid mortgage; that the Deputy County Recorder suggested to Mr. Knight that since the mortgage had not yet been placed of record it should be returned to the defendant Bank because there was no necessity for recording a mortgage which had been paid off; that thereupon the said Deputy County Recorder mailed the mortgage to the defendant Bank at its office in Santa Maria, California.

Dated this 15th day of February, 1960.

/s/ ROBERT H. FABIAN,

Subscribed and sworn to before me this 15th day of February, 1960.

[Seal] /s/ JEAN SUINESS,
Notary Public in and for said County and State.

[Endorsed]: Filed Feb. 15, 1960.

[Title of District Court and Cause.]

FURTHER AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

State of California, County of Los Angeles—ss.

William J. Tiernan being first duly sworn deposes and says:

I

That he is the attorney for the plaintiff herein and that the facts set forth are known to the affiant and that affiant could, if sworn as a witness, testify competently to said facts.

II

That the Chattel Mortgage of the Bank of America which is the subject of the controversy herein, was never recorded in Kern County. That the original of said Chattel Mortgage is in the possession of affiant and was secured from the records and files of the bankrupt concern shortly after the filing of the Petition in Bankruptcy. That an examination of this document discloses that there are no recording stamps or other marks upon it to establish that it was recorded in any other county than Santa Barbara County.

III

That in the opinion of affiant, the position of the defendant, Bank of America, with regard to the recordation of this Chattel Mortgage in Kern County, is frivolous, non-meritorious and sham. That the defendant, Bank of America, has adopted three separate positions with regard to the recordation of the Mortgage in the records of this proceeding.

a. In the original Answer to the Complaint on file herein, paragraph number 3, which is a response to paragraph VI of the Complaint, admits that the Chattel Mortgage in question was not recorded in Kern County.

b. In the amended Answer responding to the same paragraph of the Complaint, the defendant herein denies that the Chattel Mortgage was not recorded in Kern County.

c. In the pre-trial Memorandum of the defendant, Bank of America, the defendant Bank urges for the first time, the doctrine of "substantial compliance" with the recording statutes. (See pre-trial memorandum of defendant, page 4, line 28 through page 5, line 4).

IV

That attached hereto, made a part hereof and incorporated herein by reference, is a letter, dated January 22, 1958, sent by the defendant, Bank of America, to Orville Stanford, Inc. A reading of this document urges that the recordation of the Chattel Mortgage in Kern County is unnecessary.

V

That further attached to this Affidavit, made a part hereof, and incorporated herein, is a photostatic copy of the Release given by the Bank of Amercia and recorded in Santa Barbara County (not Kern County) on or about January 16, 1958, which was the quid pro quo for the Fourteen Thousand Dollars ($14,000.00) approximately received by the defendant, Bank of

America, and which is here sought to be recovered for the benefit of the creditors generally.

Further affiant sayeth not.

Dated: This 16 day of February, 1960.

/s/ WILLIAM J. TIERNAN

Subscribed and sworn to before me this 19 day of February, 1960.

[Seal] /s/ EDWIN D. CASHER,
Notary Public in and for the County of Los Angeles, State of California.

Book 1496 Page 428

RELEASE OF MORTGAGES OR MORTGAGES OF CHATTELS

1120

Know All Men by These Presents:

That Bank of America National Trust and Savings Association, the owner of the hereinafter described mortgage(s), made and executed by:

Orville Stanford, Inc., a corporation as mortgagor(s), hereby certifies and declares that said mortgage(s) has (have) been released and discharged.

The said mortgage(s) being dated and recorded (or filed) in the office of the County Recorder of Santa Barbara County, State of California, as follows:

Mortgage Dated: Feb. 21, 1956. Book: 1363. Page 281. Record: Official Records. Date of Recording: Feb. 24, 1956. Ins. No. 3476.

Mortgage Date: Sept. 12, 1956. Book: 1404. Page 258. Record: Official Records. Date of Recording: Sept. 25, 1956 (Sept. 26). Ins. No. 18675.

In Witness Whereof, the said Bank of America National Trust and Savings Association, has caused these presents to be executed by its officer thereunto duly authorized by resolution of its Board of Directors, heretofore recorded in the aforesaid County.

Dated January 15, 1958.

Bank of America National Trust and
Savings Association
By F. W. Shields
Vice President and Manager

(For County Recorder's Use Only)
Indexed Compared
1120

Recorded at request of Bank of America Nat. T. & S. Assn.—S n. Jan 16 1958 at 9:10 am Book 1496 Page 428 Offiical Records Santa Barbara County, Calif. James G. Fowler, Recorder; Lula M. Berggen, Deputy. Fee $2.00 Pd

State of California, County of Santa Barbara—ss.

On this 15th day of January 1958, before me, Martha B. Bowers, a Notary Public in and for said Santa Barbara County, personally appeared F. W. Shields known to me to be the person.... who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

Witness my hand and official seal. (Seal)

/s/ Martha B. Bowers,
Notary Public in and for said Santa
Barbara County and State.

My Commission Expires March 22, 1958.

When recorded mail to Santa Maria Branch

BANK OF AMERICA

[Letterhead]

January 22, 1958

Mr. Orville Stanford
Orville Stanford, Inc.
Box 735
Santa Maria, California

Dear Orville:

As you paid off your mortgage liability on January 10, we reserved from settlement funds the sum of $15.00 to cover the charges for drawing and recording lien release in Santa Barbara and Kern Counties. It is not necessary to record the mortgage in Kern County as recordings have not been completed there at the date of payoff of the loans.

The charges for drawing and recording the release of mortgage in Santa Barbara County amount to $7.00. We, therefore, enclose our cashier's check for $8.00 in settlement on credits over charges, with your chattel mortgage of September 12, 1956 and release of mortgage recorded January 16, 1958 in Book 1496 at page 428 of Official Records, Santa Barbara County.

Yours very truly,

/s/ F. W. SHIELDS,
Vice President and Manager

FWS:mb
Encs.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Feb. 18, 1960.

[Title of District Court and Cause.]

AFFIDAVIT OF ELMO KNIGHT

State of California, County of Kern—ss.

Elmo Knight, being first duly sworn, deposes and says: That on January 13, 1958 he went to the local Recorder's Office of Kern County at Bakersfield, California for the purpose of having a Release of Mortgage recorded; that a true copy of said release which he proposed to have recorded and submitted to the Kern County Deputy Recorder on January 13, 1958 is attached hereto marked Exhibit A and made a part hereof; that affiant was advised on said date that the chattel mortgage dated September 12, 1956 had not been placed of record and that it would be to no avail to have the release recorded. The Deputy County Recorder suggested to affiant that the best thing to do was to return all papers to Bank of America National Trust and Savings Association, Santa Maria Branch.

Dated this 23 day of February, 1960.

/s/ ELMO KNIGHT

Subscribed and sworn to before me this 23rd day of February, 1960.

[Seal] /s/ LEONA FERGUSON,
Notary Public in and for said County and State.

Exhibit A

Know All Men by These Presents:

That Bank of America National Trust and Savings Association, the owner of the hereinafter described mortgage(s), made and executed by:

Orville Stanford, Inc., a corporation as mortgagor(s), hereby certifies and declares that said mortgage(s) has (have) been released and discharged.

The said mortgage(s) being dated and recorded (or filed) in the office of the County Recorder of Santa Barbara and Kern County, State of California, as follows:

Mortgage Dated: September 12, 1956

In Witness Whereof, the said Bank of America National Trust and Savings Association, has caused these presents to be executed by its officer thereunto duly authorized by resolution of its Board of Directors, heretofore recorded in the aforesaid County.

Dated January 10, 1958.

Bank of America National Trust and Savings Association

By F. W. SHIELDS
Vice-Pres. and Manager

State of California, County of Santa Barbara—ss.

On this 10th day of January 1958, before me, the undersigned, a Notary Public in and for said Santa Barbara County, personally appeared F. W. Shields known to me to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledge to me that such corporation executed the same.

Witness my hand and official seal.

[Seal] /s/ MARTHA B. BOWERS,
Notary Public in and for said Santa Barbara County and State

My Commission Expires March 22, 1958.

When recorded mail to: Santa Maria Branch Bank of America National T. & S. Association P. O. Box 280 Santa Maria Calif

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Mar. 1, 1960.

[Title of District Court and Cause.]

AFFIDAVIT OF F. W. SHIELDS

State of California, County of Santa Barbara—ss.

F. W. Shields, being first duly sworn, deposes and says: That during January, 1958 he was Vice President and Manager of the Santa Maria Branch of Bank of America National Trust and Savings Association, defendant in the within action. That on January 7, 1958 he sent the chattel mortgage executed by Orville Stanford, Inc. in favor of Bank of America National

Trust and Savings Association dated September 12, 1956 to the County Recorder of Kern County at Bakersfield, California with the request that the mortgage be recorded in Kern County; that on January 14, or 15, 1958 the said mortgage was received at the Bank of America Branch, Santa Maria, by mail, from Mr. Charles H. Shomate, Recorder, Bakersfield, California with a transmittal letter; that the aforesaid transmittal letter read as follows:

"Enclosed find chattel mortgage executed by Orville Stanford, Inc. which you sent to this office with your letter of January 7. Mr. Elmo Knight came in this office today, and as the mortgage had not been recorded we are returning it to you together with a release which Mr. Knight had in his possession.

Very truly yours,

Chas. H. Shomate
Recorder"

Dated this 23 day of February, 1960.

/s/ F. W. SHIELDS

Subscribed and sworn to before me this 23rd day of February, 1960.

[Seal] /s/ MARTHA B. BOWERS,
Notary Public in and for said County and State.

My commission expires March 22, 1962.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Mar. 1, 1960.

[Title of District Court and Cause.]

ORDER

(1) Denying Motion for Summary Judgment —

(2) Granting Motion to Dismiss Count 1 —

The First County in Plaintiff's Complaint does not state facts sufficient to constitute a cause of action.

The mere fact that the chattel mortgage was void as to creditors does not of itself permit the trustee to recover. Assuming the chattel mortgage to be invalid, the mortgagee was nevertheless an unsecured creditor, and was entitled to payment unless the elements of a preference were present, which claim can be litigated fully under plaintiff's second cause of action.

In the cases upon which plaintiff relies, the mortgage either had taken possession of the property or had foreclosed. Neither of those elements are present in this case.

It Is Hereby Ordered that plaintiff's motion for summary judgment be, and it is denied, and

It Is Further Ordered that defendant's Motion to dismiss plaintiff's First Cause of action is granted without leave to amend.

Dated: Los Angeles, California, this 25 day of April, 1960.

/s/ PEIRSON M. HALL
United States District Judge

[Endorsed]: Filed April 25, 1960.

[Title of District Court and Cause.]

STIPULATION FOR JUDGMENT

It Is Hereby Stipulated:

1. That judgment shall be entered dismissing the second claim of plaintiff without prejudice.

2. That judgment shall be entered pursuant to the Court's order herein filed April 25, 1960 dismissing plaintiff's first claim without leave to amend.

3. That the Court shall expressly direct the entry of the judgment and shall certify pursuant to Rule 54b F. R. C. P. that the judgment entered pursuant to this stipulation is final, that there is no just reason for delay.

4. That the entry of the judgment shall not prejudice plaintiff's right to appeal from the judgment dismissing the first claim.

Dated this 1 day of July, 1960.

/s/ WILLIAM J. TIERNAN
HUGO A. STEINMEYER,
ROBERT H. FABIAN and
HARRIS B. TAYLOR
/s/ By ROBERT H. FABIAN

[Endorsed]: Filed July 5, 1960.

In the United States District Court Southern District of California, Central Division.

Civil No. 695-58-PH

A. E. MALLAGH, Trustee in Bankruptcy of the Bankrupt Estate of ORVILLE STANFORD,

Plaintiff,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association,

Defendant.

JUDGMENT PURSUANT TO STIPULATION

The above-entitled matter came on regularly to be heard before the Honorable Peirson Hall, United States District Judge, on March 21, 1960 upon the motion of plaintiff for summary judgment on the first claim and upon the counter motion of the defendant to dismiss the first claim. Plaintiff was represented by William J. Tiernan and defendant was represented by Hugo A. Steinmeyer, Robert H. Fabian and Harris B. Taylor, appearing by Robert H. Fabian. The matter was ordered submitted and on April 25, 1960 the court entered its order denying the plaintiff's motion for summary judgment and granting the defendant's motion to dismiss the first claim. The parties have stipulated that the plaintiff's second claim shall be dismissed without prejudice and that the court shall enter a final judgment pursuant to said stipulation disposing of the entire case, the plaintiff reserving his right to appeal from the judgment dismissing the first claim without leave to amend. Based upon the order previously entered on April 25, 1960, the findings and conclusions reached therein and the stipulation of the parties,

It Is Ordered, Adjudged and Decreed:

1. That the second claim set forth in plaintiff's complaint is dismissed without prejudice;

2. That the first claim set forth in plaintiff's complaint is dismissed without leave to amend pursuant to the order entered herein April 25, 1960;

3. That entry of this judgment is expressly directed and the court certifies that this judgment is final and there is no reason for delay;

4. Defendant is awarded its costs in the sum of $.....

Dated this 1st day of July, 1960.

/s/ PEIRSON M. HALL,
United States District Judge.

[Endorsed]: Filed and Entered July 5, 1960.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the clerk of the above-entitled court and to the defendants herein and their attorneys of record:

You and each of you will please take notice that A. E. Mallagh, Trustee in Bankruptcy and plaintiff in the above-entitled matter, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain judgment and every part thereof of the United States District Court for the Southern District of California, Central Division, made and entered by the Honorable Peirson Hall on or about July 5, 1960.

Dated: Aug. 3, 1960.

/s/ WILLIAM J. TIERNAN
Attorney for Plaintiff-Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Aug. 3, 1960.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the foregoing documents together with the other items, all of which are listed below, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case; and that said items are the originals unless otherwise shown on this list:

Page:

1 Names and Addresses of Attorneys.

2 Action to Recover Proceeds Paid under a void Mortgage and to recover a preference, filed 7/17/58.

7 Answer, filed 9/26/58.

13 Written Interrogatory to Plaintiff, filed 11/6/58.

18 First Amended Answer, filed 11/10/58.

24 Answers to Interrogatory to Plaintiff, filed 11/26/58.

30 Plaintiff's Notice of Motion for Summary Judgment, filed 2/3/60.

32 Affidavit in support of Motion for Summary Judgment.

49 Affidavit of Robert H. Fabian in opposition to Motion for Summary Judgment, filed 2/9/60.

52 Notice of Motion to Dismiss Complaint, filed 2/9/60.

54 Motion to Dismiss Complaint, filed 2/9/60.

56 Supplemental Affidavit in opposition to Motion for Summary Judgment, filed 2/15/60.

59 Further Affidavit in support of Motion for Summary Judgment, filed 2/18/60.

65 Affidavit of Elmo Knight, filed 3/1/60.

69 Affidavit of F. W. Shields, filed 3/1/60.

72 Order (1) Denying Motion for Summary Judgment; (2) Granting Motion to Dismiss Count 1, filed 4/25/60.

74 Stipulation for Judgment, filed 7/5/60.

76 Judgment pursuant to Stipulation, filed and entered 7/5/60.

78 Notice of Appeal, filed 8/3/60.

80 Designation of record on appeal, filed 8/3/60

82 Statement of Points on Appeal, filed 8/3/60.

84 Appellee's Designation of additional portions of record to be included in record on appeal, filed 8/5/60.

Dated: August 9, 1960.

[Seal] JOHN A. CHILDRESS,
Clerk,
/s/ By WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 17039. United States Court of Appeals for the Ninth Circuit. A. E. Mallagh, Trustee in Bankruptcy of the Bankrupt Estate of Orville Stanford, Inc., Appellant, vs. Bank of America National Trust and Savings Association, Etc., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: August 9, 1960.

Docketed: August 10, 1960.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 17039

A. E. MALLAGH, Trustee in Bankruptcy of the Bankrupt Estate of Orville Stanford, Inc.,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, etc.,

Appellee.

DESIGNATION OF RECORD AND STATEMENT OF POINTS UPON WHICH APPELLANT SHALL RELY

Comes now the appellant in the above entitled matter and designates the entire transcript of record as material to the consideration of the present appeal.

You will also take notice that the undersigned herewith designates the following as the points upon which appellant shall rely.

1. That the Court should have granted plaintiff's appellant's motion for summary judgment.

2. That the Court should not have granted defendant's appellee's Motion to Dismiss.

3. That the District Court should have adjudged the Chattel Mortgage of the Bank of America void and entered judgment in favor of plaintiff appellant for the relief requested in the complaint.

4. That the proceeds paid to a creditor holding a void Mortgage can be recovered by a subsequently appointed Trustee in Bankruptcy.

5. That a void Mortgage confers no rights whatsoever on the owner and holder thereof.

6. That the Mortgage of the Bank of America was void for the failure to record the Mortgage in Kern County.

Dated: This 18 day of August, 1960.

/s/ WILLIAM J. TIERNAN
Attorney for Plaintiff-Appellant.

[Endorsed]: Filed Aug. 18, 1960. Frank H. Schmid, Clerk.

No. 17041

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MIKE TRAMA, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
ALLISON W. BROWN, JR.,
VIVIAN ASPLUND,
Attorneys,
National Labor Relations Board.

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AUTHORITIES CITED

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In the United States Court of Appeals for the Ninth Circuit

No. 17041

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MIKE TRAMA, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court on petition of the National Labor Relations Board for enforcement of its order issued against respondent on November 17, 1959, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151 *et seq.*).[1] The Board's decision and order (R. 28–33)[2] are reported at 125 NLRB 151. This Court has jurisdiction under Section 10(e) of the Act, the unfair labor practices hav-

[1] The relevant statutory provisions are reprinted *infra*, pp. 25–26.

[2] References to portions of the printed record are designated "R." Wherever a semicolon appears, the references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

ing occurred near San Pedro, California, where respondent is engaged in the deep sea fishing business.[3]

STATEMENT OF THE CASE

I. The Board's findings of fact

Briefly, the Board found that respondent violated Section 8(a)(1) and (3) of the Act by threatening to discharge, and subsequently discharging, six crew members of the fishing vessel *Sandy Boy* for their failure to join Seine and Line Fishermen's Union of San Pedro (herein called Seine and Line). The Board relied on the following evidentiary facts.

A. Background

For several years prior to the summer of 1957, respondent was owner and master of the *Fisherman,* a deep-sea fishing vessel (R. 14–15; 42). In the summer of 1957, the *Fisherman's* crew consisted of Antoine Affidi, Vincenzo Bulone, Sal Lucca, Rosario Ruzza and Frank Ferrara, all of whom had worked for respondent at various times previously (R. 15; 42–44, 70, 124–125, 133–134). In operating the *Fisherman,* respondent had an agreement with Seine and Line and the members of the crew were members of that organization (R. 15; 44–45, 125, 134).

In the summer of 1957, another deep-sea fishing vessel, the *Sandy Boy,* was being constructed for respondent (R. 15; 45). The crew members of the *Fisherman* worked without compensation in helping to fit out the *Sandy Boy,* but with the understanding that they would work for respondent on the latter

[3] Respondent's contention that the Board improperly asserted jurisdiction in this proceeding is discussed *infra*, pp. 13–23.

vessel after its launching (R. 15; 45–46, 86–87, 117–118, 125–126). Respondent also hired Nicholas Mudry, a machinist, to install equipment on the *Sandy Boy,* with the understanding that Mudry would later serve as engineer on the vessel (R 15; 85–87, 101–102).

B. The unfair labor practices

The 1957 sardine season off the California coast opened on September 1 (R. 15; 70). None of the fishing vessels in San Pedro harbor worked in early September, however, as no agreement had been reached with the canneries on the price to be paid for catches (R. 15; 46–47). The *Sandy Boy* was ready to put to sea about September 6 (R. 46, 134–135). About two weeks later, respondent reached an agreement with Franco-Italian Packing Company whereby the latter agreed to buy respondent's catches at $80 a ton (R. 15; 48, 136). Thereupon, respondent spoke to John Calise, a business agent of Seine and Line, concerning an agreement covering the crew of the *Sandy Boy.* Calise stated that the contract for the *Fisherman* was applicable to the *Sandy Boy,* but indicated that he would not let Seine and Line members perform any fishing for respondent at that time. (R. 15–16; 48–49, 137). Respondent then went to Fishermen's Union, Local 33, ILWU (herein called Local 33) to see if something could be arranged with that organization (R. 16; 104). John Royal, an official of Local 33, told respondent that, if his crew desired to be represented by Local 33, a contract permitting fishing could be executed (R. 16; 50, 104–

105). Respondent then told Mudry, who had accompanied him on this visit to Royal's office, to get the crew to join Local 33 (R. 16; 88). Thereafter, respondent and Mudry told the crew members that they could go fishing if they joined Local 33 (R. 16; 88–89, 105). Mudry, Bulone and Ferrara signed authorizations for Local 33, and respondent subsequently entered into a contract with that organization covering the crew of the *Sandy Boy* (R. 16; 50–51, 138–139).

One September 27, the day the contract with Local 33 was executed, the *Sandy Boy* put out to sea (R. 51, 139). The next day it returned expecting to deliver its catch to Franco-Italian (R. 139). Upon the *Sandy Boy's* arrival at Franco-Italian, however, Seine and Line established a picket line at the discharge point, and unloading was delayed for several hours (R. 16; 51–53, 106–107, 139). Finally, the catch was accepted, and respondent delivered fish to Franco-Italian for the next several days (R. 16; 53). In early October, respondent temporarily ceased fishing for a few days due to the "full moon" (R. 53). When operations were resumed about October 17, respondent again brought a load of fish to Franco-Italian. A representative of the company, however, told respondent that neither that catch nor future ones could be accepted, because the cannery employees, who were members of a labor organization affiliated with Seine and Line, refused to handle them (R. 16; 54–55, 90–91).

During the following week, respondent spoke to officials of Seine and Line to ascertain what he could do to fish again (R. 55). Business Agent Calise told

respondent that he would have to sign a contract with Seine and Line and that his crew would have to pay fines and penalties in order to be reinstated as Seine and Line members (R. 16–17; 57–58). Respondent informed the *Sandy Boy's* crew of these conditions, but the crew members refused to accept the arrangement (R. 17; 60–62, 75). Respondent thereupon told Calise of the crew's decision, and the latter stated that respondent should force his crew to agree or else get a crew that would (R. 17; 62–63). Respondent next approached Local 33 for help, and was advised by one of its representatives that he could bring suit in federal court against Seine and Line for damages arising from the boycott situation (R. 17; 152–153). Respondent refused to take this course of action (R. 17; 153–154). An attempt by respondent to use the processes of the National Labor Relations Board to end the boycott also failed because respondent did not meet the Board's then current jurisdictional standards (R. 28–29, 14, n. 1, 19; 141–142).

In October, the *Sandy Boy's* crew discussed with respondent the possibility of bringing suit against Seine and Line in a State court and asked respondent to join them as a plaintiff (R. 17, 19; 142–143). Respondent refused to do this, so the crew members, on October 28, filed an action in State Court for loss of earnings, naming respondent as a defendant along with Franco-Italian, Seine and Line and others (R. 17, 19; 63–64, 143).

After the suit was instituted, respondent again met with Calise in an effort to get permission for the *Sandy Boy* to fish (R. 17; 73). Calise restated the

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conditions imposed earlier and added that the lawsuit would also have to be withdrawn (R. 17; 64–65, 73–74). Thereafter, respondent told the crew members on several occasions that if they wanted to fish again they would have to pay the required fines and penalties, be reinstated in Seine and Line, and drop their lawsuit (R. 17; 64–65, 75, 92–97, 108–109, 118–129, 145). Respondent also told the crew members that he was going to make things so miserable for them that they would quit (R. 97, 113, 114). In addition, he threatened them with discharge (R. 17; 66–67, 96–98, 111, 120–121). In his attempt to get the crew members to drop their legal action, respondent also presented them with a letter to sign which was addressed to their attorney and indicated that they wished to discontinue the State court suit (R. 92–93). The crew refused to pay the fines, seek reinstatement in Seine and Line, or drop their legal action (R. 93).

During most of November and December, the *Sandy Boy* remained idle (R. 117–118). For a few days in December, a temporary injunction secured by Franco-Italian permitted the vessel to operate, so respondent called the crew together, and during that period they fished (R. 18; 65–66, 78–79). Crew member Affidi was unavailable for work at that time as he was out of the country on a trip. Mudry was likewise unavailable, as he had secured a job elsewhere (R. 18; 98–99, 120). About December 28, respondent notified the crew members of the *Sandy Boy* that their employment was terminated as of December 31 (R. 68–69, 148). Respondent thereafter sent each member of the crew in-

cluding Affidi and Mudry, a letter informing the recipient that he was discharged (R. 19; 69, 158–161).

In January 1958, respondent obtained a new crew and resumed fishing operations (R. 18). From the time these operations commenced in 1958, respondent deducted from the earnings of each crew member amounts which were the same as those exacted from crews working under Seine and Line contracts (R. 18; 81–84). Those deductions differed from the amounts that had been deducted under respondent's contract with Local 33 (R. 18; 150). Several months later, the *Sandy Boy's* crew purportedly chose Seine and Line as their collective bargaining representative and respondent entered into a contract with that labor organization (R. 18; 82).

C. Respondent's business operations in 1957 and 1958

From the time the *Sandy Boy* was launched in September 1957, until the end of that year, respondent delivered fish to Franco-Italian valued in excess of $10,000 (R. 13–14; 129–130). That represented the sum realized from a few days fishing in September, October and December (R. 85). Because of the labor dispute in the latter months of 1957, it was not a representative figure, however (R. 14).

During the calendar year 1958, respondent's deliveries to Franco-Italian exceeded $78,000 in value (R. 14; 129–130). During the same period, Franco-Italian, in turn, shipped products valued in excess of $50,000 directly to points outside the State of California (R. 14; 157).

II. The Board's conclusions and order

Upon the foregoing facts, the Board, in agreement with the Trial Examiner, concluded that respondent violated Section 8 (a)(1) and (3) of the Act by threatening to discharge, and subsequently discharging on December 31, 1957, the crew members of the *Sandy Boy*. The discharges were effected, the Board found, because respondent believed that only by such action would Seine and Line permit him to deliver fish to the canneries. The Board concluded that the discharges of the six crew members were unlawful under Section 8(a)(3) because they had the effect of encouraging membership in Seine and Line and discouraging membership in Local 33 (R. 18–22).[4] In reaching its conclusions, the Board rejected respondent's contention that it lacked jurisdiction in this proceeding. The Board found that the value of respondent's catches in 1958, in excess of $78,000, met the Board's self-imposed jurisdictional standards, and

[4] The Board dismissed an allegation in the complaint that respondent violated Section 8(a)(1) of the Act when he informed the crew members in the latter part of September that Local 33 would accept them into membership, and that the *Sandy Boy* would be able to fish if he could work out a contract with that organization. Likewise dismissed was an allegation that Section 8(a)(1) was violated on the first occasion in October when respondent told the crew members that Seine and Line's boycott would be removed if they would pay their fines and penalties and become reinstated in that organization. The Board found that on both occasions respondent did no more than advise the crew of the conditions under which the *Sandy Boy* could resume fishing operations, and that in the circumstances, the conduct did not constitute interference with the right of the crew members to select their own bargaining representative (R. 21, 4).

that the purposes of the Act would be effectuated by the assertion of jurisdiction (R. 14, 28–29).

The Board's order requires respondent to cease and desist from the unfair labor practices found. Affirmatively, the order requires respondent to offer reinstatement to the six discharged employeees and to make them whole for any loss of earnings suffered between the date of their discriminatory discharges and March 21, 1958, and for the period subsequent to February 27, 1959.[5] The order also requires the posting of appropriate notices (R. 30–33).

SUMMARY OF ARGUMENT

I

The Board's findings that respondent threatened to discharge, and subsequently discharged, the crew members of the fishing vessel *Sandy Boy* in violation of Section 8(a) (1) and (3) of the Act are supported by substantial evidence. The credited evidence shows that the discharges were effected because the crew

[5] The backpay for which respondent is liable was tolled between March 21, 1958 and February 27, 1959, because on the former date the Regional Director for the 21st Region of the Board had refused to issue a complaint in this proceeding on the ground that respondent's operations did not meet the Board's jurisdictional standards. On February 27, 1959, respondent was informed that the Regional Director's prior administrative determination with respect to jurisdiction over respondent's operations was no longer being adhered to, and on that date the complaint herein was issued. In the exercise of its administrative discretion as to a remedy appropriate in the circumstances, the Board found that it would best effectuate the policies of the Act to suspend respondent's backpay obligation for the period in question (R. 29–30). See *Baltimore Transit Company*, 47 NLRB 109, 112–113, enforced, 140 F. 2d 51, 55 (C.A. 4).

members failed to pay fines and penalties and become reinstated in Seine and Line—the conditions which would have permitted respondent to resume fishing. The discharges were not justified by the pressures experienced by respondent resulting from his labor dispute with Seine and Line, for it is well settled that economic hardship does not exonerate an employer from his duty not to interfere with the protected right of his employees to freely choose their own bargaining agent.

II

Respondent's operations fall within the Board's legal jurisdiction and the determination of whether to assert this jurisdiction is a matter solely within the Board's discretion—the only limitation being that the Board not act arbitrarily or beyond its power. Respondent's contention that the Board in effect acted arbitrarily by asserting jurisdiction in this case is without merit. The fact that the Board previously refused to assert jurisdiction over respondent's operations in connection with another proceeding has no bearing on this case. The earlier refusal was not a license for respondent to commit unfair labor practices against the individuals named in this complaint.

The Board's assertion of jurisdiction in this case is based on its revised jurisdictional standards announced in 1958. At the time the standards were revised this case was pending before the Board and the revised standards were applied to it, although there had been an earlier ruling that under the previous standards the Board would not have asserted jurisdiction over respondent. The weight of judicial au-

thority confirms the power of the Board thus to apply to cases pending before it, revised jurisdictional standards promulgated subsequent to the occurrence of the unfair labor practices in issue. The contrary authority represented by this Court's decision in *N.L.R.B.* v. *Guy F. Atkinson,* 195 F. 2d 141 appears to have little vitality in view of subsequent decisions by the Supreme Court and by this Circuit. In any event, the *Atkinson* decision was based on its own peculiar facts, and this case is readily distinguishable. In contrast to *Atkinson,* the acts here were unlawful at the time they were committed, and any expectation that respondent may have had that it would not be held accountable for its conduct constitutes neither a legal nor an equitable defense to its statutory transgressions. *Atkinson* is further distinguishable on the ground that here the Board has fashioned an "equitable order" which has the effect of suspending respondent's backpay liability for the period during which there was an outstanding administrative determination that respondent did not meet the Board's jurisdictional standards. The Court's favorable comment in *Atkinson* concerning this type of order is authority for enforcement of the Board's order herein.

ARGUMENT

I. Substantial evidence supports the Board's finding that respondent threatened to discharge, and subsequently discharged, the crew members of the "Sandy Boy" and thereby violated Section 8(a) (1) and (3) of the Act

As the credited evidence shows *supra,* pp. 5–6, respondent, after learning from Business Agent Calise the conditions under which the *Sandy Boy* could resume fishing, threatened the crew members with

discharge if they did not pay fines and penalties and become reinstated as members of Seine and Line. That such conduct constitutes restraint, coercion and interference within the meaning of Section 8(a)(1) of the Act is too well settled to require citation.

The record also shows that respondent discharged the six crew members of the *Sandy Boy* on December 31, 1957, because they failed to heed his warning about joining Seine and Line. That such conduct violates Section 8(a) (1) and (3) of the Act is equally well settled. As stated in *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 40:

> The policy of the Act is to insulate employees jobs from their organizational rights. Thus [Section 8(a)(3) was] designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood.

In accord, see *N.L.R.B.* v. *Thomas Drayage & Rigging Co.*, 206 F. 2d 857, 859 (C.A. 9).

Concededly respondent was in a difficult position in the fall of 1957. Construction on the *Sandy Boy* had just been completed, and respondent wanted to commence fishing operations. But because of the labor difficulties with Seine and Line and the Union's boycott activities, only a fraction of the *Sandy Boy's* earning capacity was being realized. Respondent decided that the only way he would be permitted to use his vessel was by capitulating to the terms of Seine and Line. Accordingly, and as the Board

found, after the members of the *Sandy Boy's* crew refused to renew their affiliation with Seine and Line, respondent discharged the six of them, because he believed that only by such action would Seine and Line permit him to deliver fish to the canneries (R. 19–20). Though admittedly the exigencies of the situation may have seemed to respondent to require the discharges, the courts have made clear that economic hardship does not exonerate an employer from his duty not to interfere with the protected right of his employees to choose freely their own bargaining agent. *N.L.R.B.* v. *Star Publishing Co.*, 97 F. 2d 465, 470 (C.A. 9); *N.L.R.B.* v. *O'Keefe & Merritt Mfg. Co.*, 178 F. 2d 445, 449 (C.A. 9; *N.L.R.B.* v. *John Englehorn & Sons*, 134 F. 2d 553, 557–558 (C.A. 3); *N.L.R.B.* v. *Gluek Brewing Co.*, 144 F. 2d 847, 853–854 (C.A. 9).[6]

II. The Board properly asserted jurisdiction over respondent's operations

As shown *supra*, p. 7, during the calendar year 1958, respondent sold products valued at more than $78,000 to Franco-Italian which, in turn, shipped more than $50,000 worth of goods directly to points outside the State of California. Even though respondent's sales to Franco-Italian were made within the

[6] The naming of respondent as a defendant in the legal action brought by the crew members to recover lost earnings does not afford justification for their subsequent discharge, for the bringing of the suit was within the category of "concerted activities" protected by Section 7 of the Act. *Salt River Valley Water Users Assn.* v. *N.L.R.B.*, 206 F. 2d 325, 328 (C.A. 9); *N.L.R.B.* v. *Moss Planing Mill Co.*, 206 F. 2d 557, 559–560 (C.A. 4).

State of California, the fact that Franco-Italian sold across the State line is enough to establish that respondent's business affects interstate commerce. *Wayside Press* v. *N.L.R.B.,* 206 F 2d 862, 864 (C.A. 9); *Zall* v. *N.L.R.B.,* 202 F 2d 499, 500 (C.A. 9); *N.L.R.B.* v. *Sunshine Mining Co.,* 110 F. 2d 780, 784–785 (C.A. 9), certiorari denied, 312 U.S. 678. Further, since "the operation of the Act does not depend on any particular volume of commerce" (*N.L.R.B.* v. *Fainblatt,* 306 U.S. 601, 607), and the volume of respondent's annual sales to Franco-Italian was "not negligible" (*N.L.R.B.* v. *Denver Building & Construction Trades Council,* 341 U.S. 675, 684), there is no question that the Board has legal jurisdiction over respondent's operations. *N.L.R.B.* v. *Stoller,* 207 F. 2d 305, 306–307 (C.A. 9), certiorari denied, 347 U.S. 919; *N.L.R.B.* v. *Daboll,* 216 F. 2d 143, 144 (C.A. 9), certiorari denied, 348 U.S. 917.[7]

[7] Because respondent's business was curtailed in the latter part of 1957 as a result of the labor dispute involving the *Sandy Boy*'s crew, the Board followed its customary practice of considering the volume of business done in a period when operations were normal, in this instance the calendar year 1958, as an indication of the effect of respondent's operations on interstate commerce. Although the Board's policy may result, as in the instant case, in the consideration of a period which is not the one in which the unfair labor practices occurred, it is plain that if the Board's practice were not followed, strikes could result in depriving the Board of jurisdiction at times when its adjudicatory powers were most needed to adjudicate causes of labor controversies resulting in interruptions to the flow of interstate commerce. See *Essex County and Vicinity District Council of Carpenters, AFL,* 95 NLRB 969, 971; *Hygienic Sanitation Co.,* 118 NLRB 1030, 1031.

"The general rule is that, where the Board has jurisdiction, as it had in this case, whether such jurisdiction should be exercised is for the Board, not the courts to determine." *N.L.R.B.* v. *Stoller, supra,* 207 F. 2d at 307. Accord: *N.L.R.B.* v. *Denver Building & Construction Trades Council, supra,* 341 U.S. at 684; *N.L.R.B.* v. *Jones Lumber Co.,* 245 F. 2d 388, 390–391 (C.A. 9). The Board's exercise of discretion in such matters will not be disturbed unless it "was contrary to the intent of Congress, was arbitrary, [or] was beyond its power." *Office Employees International Union* v. *N.L.R.B.,* 353 U.S. 313, 320; *N.L.R.B.* v. *Jones Lumber Co., supra,* 245 F. 2d at 391 (C.A. 9); *N.L.R.B.* v. *Townsend,* 185 F. 2d 378, 383 (C.A. 9), certiorari denied, 341 U.S. 909. We show below that the Board did not exceed its authority or abuse its discretion by asserting jurisdiction in this case.

Respondent relies upon two propositions in contending that the Board improperly asserted jurisdiction in this case. First, it is argued that abstention is indicated by the fact that in the fall of 1957 when respondent sought the aid of the Board in respect to the boycott being pursued by Seine and Line, respondent was told that it did not meet the Board's jurisdictional standards. Similar reliance is placed by respondent upon the fact that in the spring of 1958, when it petitioned the Board for an election under the provisions of Section 9(c)(1)(B) of the Act to determine its employees' choice of representatives, jurisdiction was again declined for lack of a suf-

ficient volume of business to meet the Board's standards. Respondent argues that because of those two declinations of jurisdiction, the Board is foreclosed in this proceeding from asserting jurisdiction. Those were different cases, however, and involved different facts. As the Trial Examiner stated, respondent's "inability to obtain relief from the Board in respect to [those cases] does not license it to commit unfair labor practices against the individuals named in this complaint" (R. 14, n. 1). This Court took the same view regarding a similar contention only recently when it stated (*N.L.R.B.* v. *Local Union No. 751, United Brotherhood of Carpenters and Joiners of America, et al.,* No. 16,676, decided December 28, 1960, sl. op. 7):

> If and when the Board arbitrarily refuses to assert jurisdiction, a court order may be obtained requiring the Board to act.[5] But such a refusal, past or prospective, provides no ground for setting aside an otherwise valid order entered by the Board in a different proceeding. See *National Labor Relations Board* v. *Reed,* 9 Cir., 206 F. 2d 184, 190.

[5] *Hotel Employees Local No. 255, Hotel and Restaurant Employees and Bartenders International Union* v. *Leedom,* 358 U.S. 99; *Office Employees International Union, Local 11* v. *National Labor Relations Board,* 353 U.S. 313. [8]

Respondent's second argument against the Board's assertion of jurisdiction in this case is that the Board applied its current jurisdictional standards, rather than those it had been applying at the time of the

[8] And see *N.L.R.B.* v. *Gene Compton's Corporation,* 262 F. 2d 653, 656 (C.A. 9).

commission of the unfair labor practices.[9] Respondent thus contends in substance that the Board may not apply the sanctions of the Act to violations thereof if the violations occurred at a time when respondent's business did not satisfy the Board's then existing standards for asserting jurisdiction. Acceptance of this argument would largely negate the deterrent effects of the Act in a broad area within the Board's jurisdiction.

It has long been recognized that the Act bestows upon the Board broad discretion to assert, or to de-

[9] At the time of the commission of the unfair labor practices, the Board, pursuant to standards announced in *Jonesboro Grain Drying Cooperative*, 110 N.L.R.B. 481, 484, was asserting jurisdiction, *inter alia*, over enterprises shipping indirectly to out-of-state users goods or products valued at $100,000 or more. However, in a press release dated October 2, 1958 (42 LRRM 96–97) and a decision issued November 14, 1958 (*Siemons Mailing Service*, 122 NLRB 81, 84–85) the Board announced that it would apply to all "future and pending" cases involving nonretail concerns a revised standard under which it would assert jurisdiction over all concerns falling within its statutory jurisdiction having an indirect outflow across state lines of $50,000 or more. At the time the revised policy was announced, the present case was pending on appeal to the General Counsel (see Section 102.19 of the Board's Rules and Regulations, 29 C.F.R. 102.19) from action taken by the Regional Director on March 21, 1958, in refusing to issue a complaint on the ground that respondent's operations did not meet the Board's jurisdictional standards (R. 29). Because the case was before the General Counsel on appeal at the time the revised policy was announced, the Board concluded that the case was "pending," and that therefore the new jurisdictional standards were applicable (R. 29). In making this determination, the Board found its decision in *Wausau Building and Construction Trades Council*, 123 NLRB 1484, to be "clearly distinguishable" on the ground that in that case the General Counsel revived a charge which he had properly dismissed under previously existing jurisdictional standards (R. 29).

cline, jurisdiction in particular cases coming before it, whether for policy, budgetary, or other reasons. See *N.L.R.B.* v. *Indiana & Michigan Electric Co.,* 318 U.S. 9, 18–19; *Haleston Drug Stores, Inc.* v. *N.L.R.B.,* 187 F. 2d 418, 421–422 (C.A. 9), certiorari denied, 342 U.S. 815. In 1954, because inadequate funds prevented it from considering properly and expeditiously all of the cases reaching it, the Board, by means of its self-imposed jurisdictional limitations, severely restricted the number of cases in which it would assert jurisdiction, *Breeding Transfer Company,* 110 NLRB 493. As a result of the Supreme Court's opinion in *Guss* v. *Utah Labor Relations Board,* 353 U.S. 1, 10, pointing out that the Board's failure to assert jurisdiction had resulted in "a vast no-man's-land, subject to regulation by no agency or court," and subsequent increased appropriations, the Board, during the pendency of the present case before it, announced that it would exercise its statutory jurisdiction to a larger extent. *Siemons Mailing Service,* 122 NLRB 81. Viewing the self-limiting standards announced in 1954 and 1958 in the light of these purposes, obviously matters of Board discretion, respondent's argument that the 1954 standards granted it an immunity from prosecution for violation of the Act "can be seen to be an unusual one indeed." *N.L.R.B.* v. *Pease Oil Company,* 279 F. 2d 135, 137 (C.A. 2). For, "[t]he policy of the Board not to assert jurisdiction over a given situation at a given time does not license a company that comes within the purview of the Act to commit unfair labor practices at will." *N.L.R.B.* v. *Guernsey-Muskingum Electric*

Cooperative, decided December 13, 1960, 47 LRRM 2260, 2261 (C.A. 6). "An Act of Congress imposes a duty of obedience unrelated to the threat of punishment for disobedience." *Pease Oil Company, supra,* 279 F. 2d at 137. See also, *United Mine Workers* v. *Arkansas Oak Flooring,* 351 U.S. 62, 73–74; *N.L.R.B.* v. *Gottfried Baking Co.,* 210 F. 2d 772, 781 (C.A. 2).

Any doubt concerning the applicability of the stated principle to this Act was dispelled by the Supreme Court's decision in *Guss* v. *Utah Labor Relations Board, supra,* holding in substance that even though the Board may not exercise legal jurisdiction to the fullest extent, the policies and prohibitions of the Act are nonetheless applicable to business activities "affecting commerce" and that they supersede other principles of law within the sphere of the Act's provisions. The *Guss* decision was specifically relied upon by the Board in 1958 when it announced that its new standards would apply to all cases then pending, as well as to future cases. The Board said (*Siemons Mailing Service, supra,* 122 NLRB at 84–85):

> * * * the Board does not believe that the mere fact that a respondent had reason to believe by virtue of the Board's announced jurisdictional policies that the Board would not assert jurisdiction over it, gave it any legal, moral, or equitable right to violate the provisions of the Act * * *. This is especially true since the issuance of the *Guss* decision, which eliminated all possible basis for believing that in such circumstances the provisions of the Act did not

> apply, or that State law would or could apply to its conduct. In the final analysis what is conclusive with us is the fact that any other policy would benefit the party whose actions transgressed the provisions of the Act at the expense of the victim of such actions and of public policy.

Consistent with the foregoing, the courts have almost uniformly upheld the Board's power to apply to cases pending before it, revised jurisdictional standards promulgated subsequent to the occurrence of the unfair labor practices in issue. See *N.L.R.B.* v. *Pease Oil Co., supra.*; *N.L.R.B.* v. *Guernsey-Muskingum Electric Cooperative, supra*; *Optical Workers Union* v. *N.L.R.B.*, 229 F. 2d 170, 171 (C.A. 5), certiorari denied, 351 U.S. 963; *Local Union No. 12, Progressive Mine Workers* v. *N.L.R.B.*, 189 F. 2d 1, 4–5 (C.A. 7), certiorari denied 342 U.S. 868; cf. *N.L.R.B.* v. *Stanislaus Implement Co.*, 226 F. 2d 377, 378–379 (C.A. 9); *N.L.R.B.* v. *Herald Publishing Co.*, 239 F. 2d 410, 411–412 (C. A. 9); *N.L.R.B.* v. *Kartarik, Inc.*, 227 F. 2d 190, 192 (C.A. 8); *N.L.R.B.* v. *F. M. Reeves and Sons, Inc.*, 273 F. 2d 710, 712 (C.A. 10); *Leedom* v. *International Brotherhood of Electrical Workers, Local Union 108*, 278 F. 2d 237, 240–244 (C.A. D.C.).

The principal contrary authority, and the one upon which respondent relied before the Board, is represented by this Court's decision in *N.L.R.B.* v. *Guy F. Atkison,* 195 F. 2d 141. That case was decided, however, before the Supreme Court in *Guss* confirmed the preemptive sweep of the Act's prohibitions, regardless of their enforcement. Moreover, as the Second Circuit

noted in *Pease Oil* (279 F. 2d at 139), the *Atkinson* case "appears to have been overruled, *sub silentio*, by subsequent cases" in this Circuit, citing, *N.L.R.B.* v. *Daboll,* 216 F. 2d 143, 144, certiorari denied, 348 U.S. 917; *N.L.R.B.* v. *Jones Lumber Co.*, 245 F. 2d 388, 391; *N.L.R.B.* v. *Olaa Sugar Co.*, 242 F. 2d 714, 720–721. And see, *N.L.R.B.* v. *Forest Lawn Memorial Park Association,* 206 F. 2d 569, 571 (C.A. 9), certiorari denied 347 U.S. 915.

To the extent that *Atkinson* may retain any vitality, however, it is submitted that the instant case is distinguishable. For *Atkinson* involved a closed-shop contract in the construction industry executed when such contracts were valid, and the Board did not take jurisdiction over any cases in that industry. Hence, the employer was "innocent of any conscious violation of the Act." 195 F. 2d at 149. Here, in contrast, the threats and discharges effected by respondent were unlawful at the time of their commission, and respondent knew to the same extent that any other employer would know, that such acts constituted unfair labor practices. The fact that respondent may have had an "expectation that it might pursue whatever labor policy it saw fit, safe from any Board interference no matter how many violations of the Act it might commit," constitutes neither a legal nor an equitable defense to its statutory transgressions. *N.L.R.B.* v. *Pease Oil Co., supra,* 279 F. 2d at 137; *N.L.R.B.* v. *Guernsey-Muskingum Electric Cooperative, supra,* 47 LRRM at 2261.[10]

[10] The fact that respondent was specifically informed by the Board's Regional Office in the fall of 1957 that it did not meet the Board's jurisdictional standards, places respondent in no

Further warrant for distinguishing this case from *Atkinson* is found in the Board's effort herein to fashion what is referred to in *Atkinson* as an "equitable order." 195 F. 2d at 146. Thus, in *Atkinson,* the Court alluded with approval to *N.L.R.B.* v. *Baltimore Transit Co.,* 140 F. 2d 150, 155, certiorari denied, 321 U.S. 795, where the Fourth Circuit enforced a Board order in 47 N.L.R.B. 109, 112–113, which had been specifically designed to avoid retroactive application of sanctions to a period when the Board, on the basis of an administrative determination, considered itself as lacking jurisdiction over the employer's business. The Board in the instant case, citing *Baltimore Transit* as precedent (R. 30–31), similarly has limited the amount of back pay for which respondent is liable by excluding the period between March 21, 1958 and February 27, 1959, during which there was an outstanding administrative determination by the Regional Director that the Board lacked jurisdiction over re-

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different position that any employer who assumes that he can commit unfair labor practices because his volume of business does not meet the Board's published standards. See the *Pease Oil* and *Guernsey-Muskingum* decisions. Nor for that matter, is there any distinction between this situation and the one where employees engage in concerted activities with the expectation that they will be protected by the sanctions of the Act, only to have their expectation disappointed by the Board's retroactive application of standards excluding their employer from the Board's jurisdiction. Neither an employer nor employees have any "legally cognizable right in any particular Board jurisdictional policy." *Local Union No. 12, Progressive Mine Workers* v. *N.L.R.B., supra,* 189 F. 2d at 5; and see *Optical Workers Union* v. *N.L.R.B.*, 227 F. 2d 687, 691 (C.A. 5), on rehearing 229 F. 2d 170, 171, certiorari denied, 351 U.S. 963.

spondent's business. See p. 9, n. 5, *supra*. As suggested in *Atkinson*, therefore, we submit that the Court should approve the Board's "exercise of its administrative discretion in an endeavor to make an equitable order" 195 F. 2d at 146.[11]

CONCLUSION

It is respectfully submitted that a decree should issue enforcing the Board's order in full.[12]

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JANUARY 1961.

[11] Regardless of the Court's disposition of the reinstatement and back pay provisions of the order herein, the cease and desist portions, which operate prospectively, should be enforced. *Atkinson*, *supra*, 195 F. 2d at 151; *N.L.R.B.* v. *Gottfried Baking Co.*, 210 F. 2d 772, 781 (C.A. 2); *N.L.R.B.* v. *National Container Corp.*, 211 F. 2d 525, 534 (C.A. 2).

[12] In a further challenge to the Board's order on jurisdictional grounds, respondent relies on a Board decision issued in July 1960, about eight months after entry of the order herein, in which the Board dismissed a representation proceeding involving respondent's employees (Case No. 21–RC–6233) for the reason that data for the calendar year 1959 indicated that re-

spondent's indirect outflow had fallen below $50,000 annually, and that therefore respondent, during that period, did not meet the Board's jurisdictional standard. See *Fisherman's Cooperative Association, et al.*, 128 NLRB No. 11. This and other courts have recognized, however, that if the Board properly has jurisdiction in a proceeding in the first instance, enforcement of its order may not be denied merely because subsequent events indicate that the employer no longer meets the Board's jurisdictional requirements. *N.L.R.B.* v. *Cowell Portland Cement Co.*, 148 F. 2d 237, 241–242 (C.A. 9), *certiorari denied*, 326 U.S. 735; *N.L.R.B.* v. *Stanislaus Implement Co.*, 226 F. 2d 377, 378–379; *N.L.R.B.* v. *Katarik, Inc.*, 227 F. 2d 190, 192 (C.A. 8); *N.L.R.B.* v. *Red Rock Co.*, 187 F. 2d 76, 78 (C.A. 5); and see *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96, 104, n. 16.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

Representatives and Elections

Sec. 9 * * * (c)(1) Whenever a petition shall have been filed in accordance with such regulations as may be prescribed by the Board—

* * * * *

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. * * *

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No. 17041

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

MIKE TRAMA,

Respondent.

BRIEF FOR RESPONDENT.

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STATUTE

No. 17041

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Petitioner,

vs.

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Respondent.

BRIEF FOR RESPONDENT.

Jurisdiction.

This case is one wherein the National Labor Relations Board seeks to enforce its order of November 17, 1959 [R. 28-33][1] which concerns conduct which took place sometime during the period of September 1, 1957 to December 31, 1957.

Statement of Case.

1. The Board's Findings of Fact.

The Board found respondent had committed unfair labor practices in his treatment of the crewmen aboard the fishing vessel "SANDY BOY" during period of September 1, 1957, to December 31, 1957. The result of this conduct was that none of said crew was aboard said vessel as crewmen from January 1, 1958 to date of hearing of the Board's complaint.

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[1]References to portions of the printed record are designated "R." Numbers refer to pages.

2. Respondent and Facts Generally.

The facts as interpreted by the hearing examiner and adopted by the Board are stated in the petitioner's brief. The record reflects a great deal of the testimony. Respondent, feeling the record speaks for itself, will refer only sparsely to the testimony.

As in every dispute there are facts conceded to be true by all parties and those upon which there is a general disagreement.

There is general agreement respondent sought the assistance of the Board at its Los Angeles office in November of 1957[2] and his pleas for help were ignored because of lack of dollar volume of his business; that respondent again sought assistance in spring of 1958 with same result for same reason;[3] and that as late as July 1960, the Board refused to take jurisdiction of respondent for lack of dollar volume in calendar year 1959.[4]

There can be no dispute the sardine season in San Pedro in 1957 started September 1, 1957 and terminated December 31, 1957 (Cal. Fish & Game Code, Sec.

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[2]At page 5 of Petitioner's Brief there is the following language:

> "An attempt by respondent to use the processes of the National Labor Relations Board to end the boycott also failed because respondent did not meet the Board's current jurisdictional standards [R. 28-29, 14, n. 1, 19; 141-142]."

[3]Board in response to respondent's motion took official notice of fact that on March 21, 1958, respondent's petition in Case No. 21 RM 471 was dismissed by Regional Director of lack of jurisdiction [R. 29].

[4]See note 11, Petitioner's Brief, page 23 . . . Board dismissed representation proceedings involving respondent's employees (Case No. 21-RC 6233) for reason that data for calendar year 1959 indicated sales did not meet Board's jurisdictional standard of $50,000.00. *Fisherman's Cooperative Association, et al.,* 128 N. L. R. B. No. 11.

8151), nor that respondent sent to crewmen the notices to crewmen Buloni [R. 158], Mudry [R. 159], Ferrara [R. 160], and Lucca [R. 161].

Background of Respondent.

Respondent in 1959 was a twenty-five year old Italian immigrant of limited education who had first come to our country ten years before.[5] [R. 132.] He had three years of our schooling, achieving a ninth grade education. [R. 132.] At age sixteen he had started to fish with his father, Santo Trama, aboard a very small fishing vessel. Industriousness, perseverance and determination placed him in early part of 1957 as an operator of the small fishing vessel "FISHERMAN," at which time he and his father saw the need of a larger vessel and commenced construction. This new vessel was larger than the boat "FISHERMAN" but still by any standard a very small vessel.

Vessel "Sandy Boy."

The boat "SANDY BOY," which is the vessel upon which the crewmen were employed in this litigation, is 44 feet in length at the keel, the width being 16 feet. [R. 80.] The living quarters consist of a cabin ten feet wide, eleven to twelve feet long and about 7 feet high. In this cabin, the only enclosed area above decks, there are eight bunks, a tier of three on the starboard side, a tier of two on the port side, and a tier of three crosswise. [R. 80.] The balance of this cabin, which is very small, is set aside for cooking facilities, storage of food and a table area wherein all crewmen, in-

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[5]At time of action in this matter, September to December 1957, respondent would have been 23 years of age and in this country between 8 and 9 years.

cluding respondent, take their meals. The captain, or man in control (which is respondent), sleeps in one of these bunks. The vessel is controlled from a wheel situated on the top of the cabin area.

History of Dispute.

The boat "SANDY BOY" was not finished for the start of the sardine season of 1957. Endeavoring to finish it that it might commence fishing operations, the members of crew of the boat "FISHERMAN" assisted respondent in the efforts to ready the boat "SANDY BOY." The work and efforts of crewmen to outfit a boat for a fishing season was a normal and accepted practice and custom among those engaged in fishing industry in San Pedro.

Subsequent events caused the crewmen, who assisted in this operation, to institute an action in the Long Beach Municipal Court for services rendered. In this action wherein respondent was made the defendant, a verdict was rendered against the crewmen and for respondent.[6] [R. 103.]

Basically the difficulties which brought about the actions which form the basis of this lawsuit involve a jurisdictional argument between two rival unions, both

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[6]On April 1, 1958, in the Municipal Court of Long Beach Judicial District, County of Los Angeles, State of California, Vincent Buloni, Sal Lucca, Tony Affadi, Rosario Rizza and Nicholas Mudry, in Case No. 104526, sued Mike Trama, and Santo Trama for services rendered during construction of "SANDY BOY." These are same crewmen mentioned in the record of instant case. They were represented by firm of Margolis, McTernan and Branton, who represented them and Fishermen's Union, Local 33, ILWU, in the hearing before the trial examiner herein. Buloni, Lucca and Affadi each claimed $1,820.00. Rizza claimed $2,474.00 and Mudry claimed $1,589.66. On December 11, 1958, after trial, the Court rendered judgment that plaintiffs take nothing by reason of this action.

competing for the right to represent the crewmen of the boat "SANDY BOY." These unions are the Seine and Line Fishermen's Union of San Pedro, affiliated with AFL-CIO, and the Fishermen's Union, Local 33, affiliated with the ILWU. Both claimed the right to represent the crewmen of the "SANDY BOY," Seine and Line, by virtue of a working agreement with the boat "FISHERMAN," and Local 33, by virtue of a contract signed by respondent early in September 1957.

Of the actions of respondent prior to signing the contract with Local 33, and immediately subsequent thereto, there is very little dispute.

The record reflects agreement of all parties of the facts relative to signing of the agreement with Local 33, the attitude of Seine and Line, the picketing, and efforts of respondent to get the boat fishing.

Respondent's View of Facts as Seen by Board.

Respondent understands the position of petitioner to be basically:

1. That respondent did no wrong in negotiating with Local 33 and in signing contract.

2. That respondent did no wrong in fishing when Seine and Line refused to permit their men to work.

3. That respondent did no wrong in explaining to men the attitude of Seine and Line in attempting and succeeding in stopping the fishing operators of the "SANDY BOY."

4. That the men were not hired by the season.

5. That the action of respondent in not keeping the crewmen on board "SANDY BOY" after January 1, 1958, to be an unfair labor practice in that it was designed to coerce them in their right to determine their own bargaining agent.

Respondent's View of Facts.

1. There are two fishing seasons in San Pedro area; one being the sardine season from September 1, to December 31, the balance of the year being the mackerel season.

2. Crewmen are hired by the season only. They may be discharged for cause during the season.

3. Respondent had a contractual and legal right not to rehire the crewmen of "SANDY BOY" for the mackerel season of 1958.

Summary of Argument.

Respondent summarizes his contention that the order of Board should not be enforced by this Court, as follows:

1. Crewmen were hired by the season and contractually respondent had no obligation to them subsequent to December 31, 1957.

2. National Labor Relations Board has never properly established jurisdiction over respondent for year 1957.

3. Assuming jurisdiction may be asserted retroactively by the Board, this Court should not enforce any order made pursuant thereto as:

(a) The action of the Board is arbitrary and capricious.

(b) The action of Board in assuming jurisdiction is unfair and inequitable.

(c) The effect of respondent's conduct upon commerce is inconsequential and action of Board is one to enforce private rights, and not for public good.

Argument.

It is assumed evidence, on appeal, may always be found to substantiate trial court's findings. However respondent respectfully calls to attention of this Court that the trial examiner, in finding the crewmen were not hired by the season, has entirely disregarded reasonable facts and logic. Impliedly he has found men who worked on lay shores were hired for an indeterminate time. Should this be true, chaos would result to a boat owner when a crewman became injured and incapacitated. For what period of time would he be entitled to sue for loss of wages? Or should he be fired improperly, what would be his measure of damages? The trial examiner seems to have found it difficult to follow his own thinking. In his decision [R. 22] he says: "Despairing of persuading his view of the facts of life as they seemed to operate in the San Pedro area," and yet when confronted with a set of facts which were foreign to him he, as the crew, could not accept facts as they operate in the fishing industry. He could not find the crew to be hired for the season because of the work they had done in preparing the vessel for fishing. This finding of permanent employment is the basis for holding respondent for unfairly discharging the crew. The crewmembers' testimony and actions indicated they could leave the vessel at any time. Affidi left to go to Algiers, Buloni left for better fishing in Alaska, and Mudry said he could leave at any time as "he was not a slave." It is well known where a fisherman is employed on a lay shore basis he is either hired by the season or the trip. There is no other basis for determining his pay in the event of a mishap or misunderstanding.

Had there been any other arrangement, respondent would not have waited until December 31, 1957 to take the action he did. By contract based on custom and useage he did only that which he was legally entitled to do. He did no wrong.

Assuming respondent did not have the right to refuse to employ the crewmen after 1957 and his conduct was improper, respondent then vigorously asserts the actions of the Board are unjustified as there has been no jurisdiction established. This position is asserted prior to any argument of the propriety of retroactive jurisdiction. (Discussed *infra.*)

The entire jurisdictional basis of this case is upon the dollar volume of respondent for the year 1958. The Board has refused to consider jurisdiction of respondent for 1957 and 1959 upon the dollar volume (or lack of it) for those years. It is to be remembered the only acts of respondent under attack here were those of 1957. They were not continuing acts and did not carry past December 31, 1957.

Respondent contends his case is unique and not in the same category as any case cited by petitioner in its brief. Respondent feels the Board and petitioner may argue in theory at great length but cannot escape the bitter truth that its past treatment of respondent can never justify its present stand which is either unfair, inequitable, or, to say the least, arbitrary. Respondent in this position will rely only upon a very few cases.

In all cases cited by the government there is not one in which the respondent actively sought assistance from the Board, was refused, and left to his own devices.

Respondent here, when beset by a problem which was beyond him, and beyond assistance of the state courts, sought out the Board and beseeched it for help, only to be refused. Admittedly at this point he was in a difficult position and needed help. In effect he was told "The Board cannot help you. Work it out yourself." Again after he had, by his own efforts "worked it out" and had the boat fishing he voluntarily sought the Board's aid and was refused. When the Board called him to task its previous rulings concerning respondent were called to its attention to no avail. Surely at this point the Board should have asserted the position it had taken in *Compressed Air, etc. v. Union and James P. Kenny,* 93 N. L. R. B. 274; *C. A. Braukman, etc. and International Union of Operating Engineers,* 94 N. L. R. B. 234.

> ". . . The question thus posed is whether or not the Board should apply retroactively its present jurisdictional standards, and assert jurisdiction in the instant complaint case, although the Board had before and after the commission of the alleged unfair labor practices, refused to assert jurisdiction over Respondent's operations on the basis of then existing standards.
>
> "The Board believes that the question should be answered in the negative. This result is dictated not only by the Board's obligation to respect its own prior decisions, but also by desire for fair play. It would be inequitable now to hold the respondent liable for the activities in question, as the Board, almost 2 years ago, in effect advised the Respondent that such activities occurred at a

time when 'it would (not) effectuate policies of The Act to assert jurisdiction' over the respondent's operation."

To add to the arbitrariness of the Board, when an opportunity again was presented to Board to determine a representation suit involving respondent in 1960, it refused. The action of the Board has been to deny respondent access to the Board in 1957, 1958 and in 1960, on the basis of lack of dollar volume. However, it has on the one single occasion when it would harm him financially, sought by all means to assert jurisdiction. Curiously enough the dollar volume of 1958, upon which the Board bases jurisdiction, was accomplished by respondent's conduct of which the Board now complains. If he had done nothing and the boat had remained at the dock, it is to be presumed the Board would never have asserted jurisdiction.

The Board has expended considerable time, effort and money to pursue this matter. Petitioner has cited case after case to assert the right of the Board to act herein, but in all the verbiage can the petitioner honestly say, "this is fair, this is right?"

Assuming everything the Board has asserted is true and correct and petitioner's theories of retroactive assertion of jurisdiction are proper, can they honestly say to this Court—enforcement of this order is fair, just and equitable? The test is as set forth in *N. L. R. B. v. Guy F. Atkinson,* 195 F. 2d 141:

> "We think it apparent that the practical operation of the Board's change of policy, when incorporated in the order now before us, is to work hardship upon respondent altogether out of propor-

tion to the public ends to be accomplished. The inequity of such an impact of retroactive policy making upon a respondent innocent of any conscious violation of the act, and who was unable to know, when it acted, that it was guilty of any conduct of which the Board would take cognizance, is manifest. It is the sort of thing our system of law abhors."

Petitioner attempts to distinguish the *Atkinson* case from this one by asserting the actions of respondent were known by him to constitute unfair labor practices. The test is whether respondent knew his conduct was wrong. In view of action of Board, was not respondent told to handle matters as he could and that the Act did not cover his business? Respondent believes the dissenting opinion in the matter of *N. L. R. B. v. Pease Oil Company,* 279 F. 2d 135, to well state respondent's position herein concerning the fair play and equities involved.

"The instant case presents the question whether, a certain standard having been announced, and an employer having acted upon the assumption that it would be adhered to, he may be brought to book on the basis of a wholly different standard later announced, which later standard is well within the jurisdiction conferred on the Board by the statute." . . . Citing *Braukman* case, Court says:

"I think that the Board's language in the Braukman case . . . was an excellent expression of the standard of conduct which the government and its agencies should observe toward the public. The question is essentially one of fair play. The

> Board has, as the statute authorized it to do, petitioned this Court for a decree enforcing the Board's Order. A court of appeals, in determining whether or not such a decree should be issued, sits as a Court of Equity, and will not exercise the power of such a court to produce a result which court regards as essentially unfair."

That the action of the Board will work a hardship on respondent is a foregone conclusion. Retroactive pay for the crewmen would virtually force him to the wall, to be balanced by what public need?

N. L. R. B. v. E. & B. Brewing Co., 276 F. 2d 594, citing *N. L. R. B. v. National Container Corp.*, 211 F. 2d 525.

> "It is well settled that where, as here, an administrative agency in pursuance of its adjudicating function makes an ad noc change in one of its administrative policies, such change may be applied retroactively in an appropriate case . . . The test is whether 'the practical operation of the Board's change of policy . . . (will) work hardship upon respondent altogether out of proportion to the public ends to be accomplished." (Citing *N. L. R. B. v. Atkinson*).

If anything is to be accomplished by enforcement of the ruling of the Board, it can be only the economic gain of crewmen. Yet

> "The Courts have uniformly recognized that the National Labor Relations Act did not confer private rights, but granted only rights in the interest of the public to be protected by a procedure looking solely to public ends. The proceeding au-

thorized to be taken by the Board was not for the adjudication or vindication of private rights. *Haleston Drug Stores, Inc. v. N. L. R. B.,* 187 F. 2d 148."

It is true the Board in exercise of its administrative discretion in an endeavor to make an equitable order "has eliminated part of the retroactive pay ordered by the trial examiner," and this may in some manner assuage the conscience of the Board, but it would seem this only recognizes the justification of respondent's position and undermines that of the Board. Had the Board eliminated all retroactive pay there could be some basis for claiming the Board acted for the public good.

Conclusion.

It is respectfully submitted this Honorable Court should refuse to enforce the order of the Board.

HOWARD E. MILLER,
Attorney for Mike Trama.

No. 17041

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NATIONAL LABOR RELATIONS BOARD,

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Transcript of Record

Petition for Enforcement of an Order of the National Labor Relations Board

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

Appearances:

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Los Angeles, California,

appearing as Counsel for General Counsel.

HOWARD E. MILLER, ESQ.,
821 South Pacific Avenue,
San Pedro, California,

appearing on behalf of Mike Trama.

BEN MARGOLIS, ESQ.,
c/o MARGOLIS, McTERNAN and BRANTON,
112 West 9th Street,
Los Angeles 15, California,

appearing on behalf of Fishermen's Union, Local 33, ILWU, Charging Parties.

GENERAL COUNSEL'S EXHIBIT 1-C

United States of America
Before the National Labor Relations Board
Twenty-First Region

Case No. 21-CA-2904

MIKE TRAMA (F/V SANDY BOY)
and
FISHERMEN'S UNION, LOCAL 33, ILWU

COMPLAINT AND NOTICE OF HEARING

It having been charged by Fishermen's Union, Local 33, ILWU, herein called Local 33, that Mike Trama (F/V Sandy Boy), herein called Respondent, has engaged in, and is engaging in, unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director, issues this Complaint and Notice of Hearing, pursuant to Section 10 (b) of the Act, and Section 102.15 of the Board's Rules and Regulations, Series 7, as amended.

1. The charge was filed by Local 33 on January 13, 1958, and was served on Respondent by registered mail on January 13, 1958.

2. Respondent, at all times material herein, is and has been engaged in the business of deep sea fishing. Respondent maintains business and office addresses at c/o Howard E. Miller, 821 South Pacific Avenue, San Pedro, California, and 1015 Harbor View, San Pedro, California.

3. Respondent, during the calendar year 1958, sold and delivered to Franco-Italian Packing Co., herein called Franco-Italian, fresh fish valued in excess of $50,000.

4. Franco-Italian is engaged, at San Pedro, California, in the business of processing, canning and distributing sardines and other fish.

5. During the calendar year 1958, Franco-Italian shipped canned fish valued in excess of $50,000 directly to points outside the State of California.

6. Respondent is, and at all times material hereto has been, engaged in commerce within the meaning of Section 2, subsections (6) and (7) of the Act.

7. Fishermen's Union, Local 33, ILWU, is a labor organization within the meaning of Section 2, subsection (5) of the Act.

8. Seine and Line Fishermen's Union of San Pedro, Seafarers International Union of North America, AFL-CIO, herein called Seine and Line, is a labor organization within the meaning of Section 2, subsection (5) of the Act.

9. Respondent has interfered with, restrained and coerced, and is interfering with, restraining and coercing, its employees in the exercise of rights guaranteed them in Section 7 of the Act, by Mike Trama:

(a) Telling employees during the period beginning on or about September 1, 1957, and ending on or about September 27, 1957, that if they wished to fish with and for him they would have to join Local 33;

(b) Telling employees during the period beginning on or about October 1, 1957, and ending on or about December 31, 1957, that they could not fish with and for him unless they joined Seine and Line;

(c) Telling employees during the period beginning on or about October 1, 1957, and ending on or about December 31, 1957, that they could not fish with and for him unless they dropped their lawsuit against Respondent, Seine and Line, and others;

(d) Telling employees during the period beginning on or about October 1, 1957, and ending on or about December 31, 1957, that if they didn't join Seine and Line, they would be discharged; and

(e) Telling employees during the period beginning on or about October 1, 1957, and ending on or about December 31, 1957, that if they didn't drop their lawsuit against Respondent, Seine and Line, and others, they would be discharged.

10. On or about January 2, 1958, Respondent discharged the following employees and thereafter failed and refused, and does now fail and refuse to reinstate them to their former, or substantially equivalent positions of employment:

Antoine Affidi	Sal Lucca
Vincenzo Bulone	Rosario Rizza
Frank Ferrara	Nick Mudry

11. The Respondent discharged the employees named in paragraph 10 above and thereafter failed and refused, and does now fail and refuse to reinstate them to their former, or substantially equivalent positions of employment because of their membership in Local 33, because they were not and did not become members of Seine and Line and because they engaged in concerted activities for the purposes of collective bargaining and other mutual aid or protection, including bringing a lawsuit for damages for loss of earnings against Respondent, Seine and Line, and others.

12. Respondent, by the acts set forth and described in paragraphs 10 and 11 above, discriminated against, and is discriminating against, the employees named in paragraph 10 above in regard to their hire and tenure of employment, in order to discourage membership in Local 33, encourage membership in Seine and Line and to discourage concerted activities protected by Section 7 of the Act, and thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the act.

13. Respondent, by the acts set forth and described in paragraphs 9, 10, 11 and 12 above, and by each of said acts, interfered with, restrained and coerced, and is interfering with, restraining and coercing, its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

14. The acts of Respondent, as set forth and described in paragraphs 9, 10, 11, 12 and 13 above, and occurring in connection with the operations of Respondent, as described in paragraphs 2, 3, 4, 5 and 6 above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states of the United States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

15. The acts of Respondent described above constitute unfair labor practices affecting commerce within the meaning of Section 8 (a), subsections (1) and (3), and Section 2, subsections (6) and (7) of the Act.

Please Take Notice that on the 13th day of April 1959, at 10:00 A.M., PST, in Hearing Room 2, Mezza-

nine Floor, 849 South Broadway, Los Angeles, California, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 7, as amended, Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to said Complaint within ten (10) days from the service thereof, and that unless it does so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

Wherefore, on this 27th day of February 1959, the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused the Regional Director of the Twenty-First Region to issue this Complaint and Notice of Hearing against Respondent herein.

/s/ RALPH E. KENNEDY,
Regional Director
National Labor Relations Board
Twenty-First Region
849 South Broadway
Los Angeles 14, California

Admitted in Evidence April 13, 1959.

GENERAL COUNSEL'S EXHIBIT 1-G

[Title of Board and Cause.]

ANSWER OF MIKE TRAMA TO COMPLAINT

Comes now Mike Trama and for answer to the Complaint of the National Labor Relations Board admits, denies and alleges as follows, to-wit:

I.

Answering Paragraph 2, Mike Trama denies he maintains a business and office address c/o Howard E. Miller, 821 South Pacific Avenue, San Pedro, California.

II.

Answering Paragraph 5, Mike Trama alleges he does not have sufficient information or belief to enable him to answer the allegations contained in said paragraph and basing his denial upon such lack of information and belief denies generally and specifically, jointly and severally, each, all and every allegation contained therein, and the whole thereof.

III.

Answering Paragraph 6, Mike Trama alleges he does not have sufficient information or belief to enable him to answer the allegations contained in said paragraph and basing his denial upon such lack of information and belief denies generally and specifically, jointly and severally, each, all and every allegation contained therein, and the whole thereof; further answering the allegations of said paragraph, upon information and belief Mike Trama alleges that prior to January 1st, 1958 he was not engaged in commerce within the meaning of Section 2, subsections 6 and 7 of the Act.

IV.

Answering Paragraphs 7 and 8, Mike Trama alleges he does not have sufficient information or belief to enable him to answer the allegations contained in said paragraph and basing his denial upon such lack of information and belief denies generally and specifically, jointly and severally, each, all and every allegation contained therein, and the whole thereof.

V.

Answering Paragraph 9, Mike Trama denies generally and specifically, jointly and severally, each, all and every allegation contained therein and the whole thereof; further answering the allegations contained within said paragraph, Mike Trama specifically denies as follows:

a. That during a period beginning on or about September 1st, 1957 and ending on or about September 27th, 1957, or at any time whatsoever inclusive of said dates or any other dates, did he tell employees or any other persons whomsoever that if they wished to fish with or for him they would have to join Local 33 or any other organization.

b. That during a period beginning on or about October 1st, 1957 and ending on or about December 31, 1957, or at any other time inclusive of said dates or any other dates, did he tell employees or any other persons whomsoever that they could not fish with or for him unless they joined Seine and Line Fishermen's Union of San Pedro or any other organization.

c. That during a period beginning on or about October 1st, 1957 and ending on or about December

31st, 1957, or at any other time inclusive of said dates or any other dates, did he tell employees or any other persons whomsoever that they could not fish with or for him unless they dropped their lawsuit against Seine and Line Fishermen's Union or any other organization.

d. That during a period beginning on or about October 1st, 1957 and ending on or about December 31st, 1957, or at any other time inclusive of said dates or any other dates, did he tell employees or any other persons whomsoever that they would be discharged if they did not join Seine and Line, or any other organization.

e. That during a period beginning on or about October 1st, 1957 and ending on or about December 31st, 1957, or at any other time inclusive of said dates or any other dates, did he tell employees or any other persons whomsoever that they would be discharged if they did not drop their lawsuit against Seine and Line, or any other organization.

VI.

Answering Paragraph 10, Mike Trama denies generally and specifically, jointly and severally, each, all and every allegation contained therein, and the whole thereof; further answering the allegations of said paragraph, Mike Trama denies on or about January 2nd, 1958 he discharged the employees listed in said paragraph and, to the contrary, alleges Nick Mudry and Antoine Affidi voluntarily terminated their employment with Mike Trama some time previous to December 31st, 1957; further answering the allegations of said paragraph, Mike

Trama alleges all employees named in said Paragraph 10 were hired for the sardine fishing season which terminated December 31st, 1957 and that said employment by its own terms terminated at said time.

VII.

Answering Paragraph 11, Mike Trama denies generally and specifically, jointly and severally, each, all and every allegation contained therein, and the whole thereof; further answering the allegations of said paragraph Mike Trama denies his refusal to rehire any of the persons named in Paragraph 10 of the Complaint was because of their membership in Local 33, or any other organization, or was because they were not or would not become members of Seine and Line, or any other organization, or was because they engaged in concerted activities for the purpose of collective bargaining and mutual aid or production, including bringing a law suit for damage for loss of earnings against Mike Trama and, to the contrary, alleges upon termination of their term of hire Mike Trama exercised his rights and privileges to refuse to hire the parties named in Paragraph 10 of the Complaint for personal reasons which he believed to be for the betterment of peace and harmony in working conditions aboard the fishing vessel Sandy Boy.

VIII.

Answering Paragraphs 12, 13, 14 and 15, Mike Trama denies generally and specifically, jointly and severally, each, all and every allegation contained therein and the whole thereof.

For an Affirmative, Separate and Distinct Defense of the Complaint

I.

That the alleged acts complained of in the Complaint occurred prior to the time when complainant alleges the National Labor Relations Board to have entertained jurisdiction of the parties named herein.

Wherefore, Mike Trame prays for a ruling he has never engaged in unfair labor practices and this Complaint be hence dismissed.

/s/ HOWARD E. MILLER,
Attorney for Mike Trama

Duly Verified.

Admitted in Evidence April 13, 1959.

[Title of Board and Cause.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

Upon a charge filed by Fishermen's Union, Local 33, ILWU, herein called Local 33, the General Counsel of the National Labor Relations Board issued his complaint alleging that Mike Trama, herein sometimes the Respondent, has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 61 Stat. 136, herein called the Act.

It is alleged that Mike Trama on one occasion told his employees that their employment depended upon becoming members of Local 33, and on other and subsequent occasions, told them that they could not work unless they joined Seine and Line Fishermen's Union of San Pedro, herein called Seine and Line. It is finally alleged that Trama discharged his six employees because of their refusal to join Seine and Line.

Respondent's answer traverses many of the factual allegations in the complaint, questions the jurisdiction of the Board in the premises, and denies the commission of unfair labor practices.

Pursuant to notice a hearing was held before the undersigned Trial Examiner in Los Angeles, California, on April 13 and 15, 1959. All parties were represented by counsel and participated in the hearing. Briefs have been received from counsel for the Respondent and counsel for the General Counsel.

Upon the entire record in the case and from my observation of the witnesses I make the following:

Findings of Fact

I. The business of the Respondent

The complaint bases assertion of jurisdiction upon the Respondent's business operations in the calendar year 1958. Certain of the unfair labor practices, however, are alleged to have occurred in the closing months of 1957. It is argued that the operations of the Respondent in 1957 did not meet the Board's then effective jurisdictional standards, or, for that matter, did not meet the standards as they have since been changed. The business of the Respondent is deep-sea fishing. From a date

in late September 1957 until the end of that year the Respondent delivered fish having a value in excess of $10,000 to Franco-Italian Packing Co., herein called Franco-Italian. During the calendar year 1958 deliveries to Franco-Italian exceeded $78,000 in value. Franco-Italian is engaged at San Pedro, California, in the business of processing, canning and distributing sardines and other fish and in 1958, shipped products valued in excess of $50,000 directly to points outside of the State of California. As will more particularly appear, a labor dispute current in the latter months of 1957 curtailed Respondent's fishing operations to such an extent that the period is not a representative one. As Respondent's operations during the year 1958 satisfy the jurisdictional requirements of the Board, I find that jurisdiction exists and that the purposes of the Act will be effectuated by its assertion.[1]

II. The organizations involved

Local 33 and Seine and Line are labor organizations within the meaning of Section 2 (5) of the Act, admitting to membership employees of the Respondent.

III. The unfair labor practices

For several years until sometime in the summer of 1957 Trama was the owner and master of the Fisher-

[1]Abstention is indicated, it is argued, because in the fall of 1957 the Respondent, when seeking the aid of the Board in respect to a secondary boycott being pursued by Seine and Line, was informed that he did not meet jurisdictional standards. The argument might be appealing were we now being asked to remedy an unfair labor practice occurring at that time and running between Seine and Line and the Respondent. That is not this case. The Respondent's inability to obtain relief from the Board in respect to Seine and Line does not license it to commit unfair labor practices affecting the individuals named in this complaint. Siemons Mailing Service, 122 NLRB No. 13.

man, a deep-sea fishing vessel. In June of that year and at various times before that month his crew consisted of Antoine Affidi, Vincenzo Bulone, Sal Lucca, Rosario Rizza and Frank Ferrara. The Respondent, in operating the Fisherman, had an agreement with Seine and Line, and the crew were members or permit-holders of the organization. In the summer of 1957, another vessel, the Sandy Boy, was being constructed for the Respondent. The crew of the Fisherman aided in the fitting out of the Sandy Boy without compensation but with the understanding that they would fish from the Sandy Boy after its launching. Also in June the Respondent hired Nicholas Mudry, a machinist, to handle the installation of equipment in the Sandy Boy. Mudry worked full time on this task throughout the summer of 1957 until the vessel was ready to go fishing. It was understood between Mudry and the Respondent that when the vessel began fishing he would go along as engineer. For the time that he spent in installation work he was paid $100 a week.

The sardine season off the California coast opened on September 1. Because no agreement had been reached with the canneries on the price to be paid for fish none of the fishing vessels in the San Pedro harbor were working. The Sandy Boy was ready to go out in late September, and before that time came the Respondent managed to reach an agreement with Franco-Italian to take his catch at $80 a ton. Other canneries were offering $55. The Respondent, eager to try fishing at the $80 price, spoke to John Calise, a business agent for Seine and Line in an attempt to reach agreement with Calise covering the crew of the Sandy Boy so that fishing could get under way. Calise said that the contract covering

the Fisherman was applicable to the Sandy Boy but refused to give his approval to any fishing at that time by the Respondent. Trama then went to Local 33 to see what he could work out with that organization. He was told by John Royal, an official of Local 33, that if his crew desired to be represented by Local 33 a contract permitting fishing could be arranged. Mudry who accompanied the Respondent on this visit testified that the Respondent told him to get the crew to join Local 33. Thereafter, according to Mudry, he and the Respondent told the crew that they could go fishing if they joined Local 33. Mudry, Bulone and Ferrara signed dues-deduction authorizations for Local 33, whereupon that Local and the Respondent entered into a contract covering the crew of the Sandy Boy. On the evening of September 27 the Sandy Boy went fishing and returned the next day with its catch to Franco-Italian.

There an indication of the troubles that were to beset the Respondent and his crew awaited them. A picket line was established at the discharge point by Seine and Line, and for a number of hours loading was delayed. Finally the catch was accepted and the vessel delivered fish to Franco-Italian for the next several days. About October 17, a representative of Franco-Italian told Trama that his catch could not be accepted because the workers in the cannery, members of a labor organization affiliated with the parent body of Seine and Line, would not handle it. In the following week Trama talked with officials of Seine and Line to learn why he was being stopped from fishing. Calise said that first the Respondent would have to sign a contract with Seine and Line and his crew members would have to pay substantial fines and penalties in order to be reinstated as Seine and Line

members. The Respondent informed his crew that it appeared possible to continue fishing only if they became Seine and Line members and paid the penalties demanded. The crew refused to accept this arrangement. Trama told Calise of the decision of the crew members. Calise answered that Trama should force the crew to agree or get a crew that would. Trama then sought the aid of Local 33. He was advised that he could, with promise of success, bring an action in Federal Court against Seine and Line for damages arising out of the boycott situation. He refused to take this action. On October 28 the crew members brought suit in a State court against Franco-Italian, Seine and Line, the Respondent, and others, for loss of earnings.

After this suit was filed the Respondent again met with Calise in an effort to gain permission for the Sandy Boy to fish. Calise again stated the conditions he had imposed earlier and added that the lawsuit must be withdrawn.

Literally and figuratively the Respondent and his crew were in the same boat. No matter what success they might have in catching fish this could not be translated into earnings until the catch was sold. Seine and Line appears effectively to have prevented such sales. Certainly the Respondent violated no aspect of the Act in telling the crew members of the demands made by Calise and in listening to their reactions to the proposals of Seine and Line, but finally Respondent decided that the only way he would be permitted to use his vessel and to employ his crew was by capitulating to the terms of Seine and Line. In November he told the crew that unless they obtained reinstatement with Seine and Line and droppped their lawsuit he would discharge them. The vessel remained idle in November and for most of

December while the Respondent obtained employment on the vessel of a relative. For a few days in December a temporary injunction secured by one of the canneries permitted the Sandy Boy to fish. When this opportunity came Affidi was off on a trip to Algiers and Mudry had found other employment. On December 31 the Respondent notified each crew member that his employment was terminated.

In January 1958 Trama obtained a new crew and went fishing. From the beginning of its operations in 1958 the Respondent deducted from the earnings of each crew member those amounts paid by crews covered by contracts with Seine and Line. These deductions were different in amount from those made under the contract with Local 33. Several months later, assertedly at the request of the new crew members, Trama entered into a contract with Seine and Line covering the crew.

It is urged on the part of the Respondent that the crew members were employed for the sardine season ending December 31 and that they had no expectation of employment beyond that date. Those of the crew who testified, however, said in effect, that they were employed for no partitular period with the anticipation that they would remain on the vessel as long as they cared to stay or until the Respondent decided to discharge them. Certainly it appears unlikely to me that the crew members would have worked without compensation for several months in the summer of 1957, preparing the Sandy Boy for fishing if belief existed that they would be permitted to work only for the sardine season. The Respondent admitted that his crew was competent enough but testified that he decided to replace them when they filed suit against him. The Respondent's argument,

runs in effect, that a fishing vessel is too small to house individuals whose dispute has ripened to the point of legal action.

The crew members recognized that their problem was not with the Respondent but with Seine and Line. The Respondent concluded that if he ever wanted to put his vessel to the use for which it was designed and to realize some return on his very substantial investment he must find a way to make peace with Seine and Line. At first he discussed the problem with the crew in what appears to have been an earnest effort to find a solution and sought advice and assistance from Local 33. When all seemed unavailing, the attempt to get relief through the National Labor Relations Board foundered on the reef of jursdictional policy, he decided that he must give in to the Seine and Line and did so. From about November 9, 1957 through the end of the year he repeatedly told his crew that they could not work aboard the Sandy Boy unless they reached accommodation with Seine and Line. The Respondent's testimony that he lost confidence in his crew when they filed a suit in State court naming him as one of the defendants does not ring true. The question of bringing that action was discussed with him before filing and he was asked to join as a plaintiff. Only when he refused to do so was his name added as a defendant. In the circumstances existing he must have known that the suit did not reflect an attitude of animosity but rather an attempt to secure relief from a situation no less onerous to the Respondent than to the crew. I do not credit Respondent's testimony that he discharged his crew at the end of 1957 because he could no longer trust them. I find that the Respondent discharged his crew and each of them because he believed that only by such action would Seine and Line

permit him to deliver fish to the canneries. He then hired a new crew and began fishing in January.

There is no direct evidence that the Sandy Boy sailed in January 1958 under any sort of agreement with Seine and Line, or that the crew members hired to replace those discharged were then Seine and Line members. From the fact that the deductions from earnings were made in amounts required by Seine and Line contracts and from the further fact that the Sandy Boy in January and thereafter was able to market its catch without interference by Seine and Line, I infer that some sort of truce arrangement was reached.

I credit the testimony of Mudry and Affidi that the Respondent commanded the crew to get reinstated in Seine and Lne and to drop their lawsuit if they wished to continue fishing on the Sandy Boy. I also credit the undenied testimony of Bulone that shortly after January 1, 1958 when Bulone asked the Respondent to rehire him the Respondent said that he could not do so because Seine and Line would cause him trouble.

In November 1957 and thereafter, the crew of the Sandy Boy was aware from what the Respondent had told them that they no longer would be employed aboard the vessel after the closing of the sardine season unless they became Seine and Line members. In this circumstance and in view of the fact that the Sandy Boy did not fish in the remainder of 1957 except for a few days in December when an injunction permitted it to do so, I find that Affidi did not abandon his employment by going to Algiers and that Mudry did not abandon his by taking another job. Neither of these men had reason to believe that they would be called upon again to fish on the Sandy Boy.

The Respondent is, of course, an employer. The selection of the crew is for him and their retention is at his pleasure. But in a very real sense both the master and the crew members are at the mercy of forces quite beyond the effective influence of either. In September 1957 the Respondent knew that he could sell sardines to Franco-Italian at a price he considered attractive. The question then obtrudes why did not he and his crew set about getting all the sardines they could and bringing them to that market. The answer is found in this record and it is obvious that both the Respondent and his crew believed that in order to do so they must first enter into some sort of contract arrangement either with Seine and Line or with Local 33. This belief was well founded and controlling. When Seine and Line refused to authorize fishing the Respondent asked Local 33 to do so. He was successful in circumstances already related. I do not consider this record to establish that in respect to Local 33 the Respondent did more than to tell the crew of the opportunity to fish and the willingness of Local 33 to give permission if the crew became members of that organization. No doubt he said that there could be no fishing otherwise and I think that he was reporting a fact which the crew well knew. I do not find this to be in the circumstances an interference with the right of the crew members to select their own bargaining representative. The respondent did no more I think than advise them of the opportunity. The economic thurst which moved the crew toward membership in Local 33 was not generated by him. I find no violation of the Act in the arrangement with Local 33 or in respect to what the Respondent told the crew in that connection. I view the early conversations between the Respondent and his crew later, in respect to Seine and Line in the same light.

Again an opportunity to fish seemed to exist and the Respondent at first did no more than advise his crew what action on their part would permit them to seize it.

But the conversations did not long remain on a level of debate. Despairing of persuading his crew of the facts of life as they seemed to operate in the San Pedro area the Respondent used his economic power as an employer first to threaten discharge if the crew members did not come within the fold of Seine and Line and finally to implement the threat when they failed to do so. I find that by threatening discharge to the crew members as found above the Respondent interfered with, restrained, and coerced them in the exercise of rights guaranteed in Section 7 of the Act and that the Respondent thereby violated Section 8 (a) (1) of the Act.

By discharging Affidi, Bulone, Rizza, Ferrara, Lucca, and Mudry on December 31, 1957, the Respondent discriminated in regard to their hire and tenure of employment thus encouraging membership in Seine and Line and discouraging membership in Local 33 and thereby violated Section 8 (a) (3) of the Act. By the discharges the Respondent interfered with, restrained and coerced his employees in respect to rights guaranteed in Section 7 of the Act and thereby violated Section 8 (a) (1) of the Act.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth in Section III, above, occurring in connection with its operations set forth in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the Respondent has engaged in certain unfair labor practices it will be recommended that he cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has threatened the crew of the Sandy Boy with discharge unless they joined Seine and Line, and having found that the Respondent on December 31, 1957 discharged Antoine Affidi, Vincenzo Bulone, Frank Ferrara, Sal Lucca, Rosario Rizza, and Nick Mudry, because they refused to join Seine and Line it will be recommended that the Respondent, in addition to ceasing and desisting from such conduct, offer to each of these named individuals immediate reinstatement, each to his former position aboard the Sandy Boy, discharging if necessary any replacements, and make each of them whole for any loss of earnings occasioned by the discrimination against them. The loss of earnings shall be computed in accordance with the formula stated in F. W. Woolworth Co., 90 NLRB 289. It will also be recommended that the Respondent be ordered to make available to the Board or its agents upon request, all information concerning the fishing operations of the Sandy Boy from January 1, 1958 including information concerning sales and other dispositions of its catch in order to facilitate the computation of the amount of back pay due.

Upon the foregoing findings of fact and upon the entire record in the case I make the following:

Conclusions of Law

1. Local 33 and Seine and Line are labor organizations within the meaning of Section 2 (5) of the Act.

2. The Respondent, Mike Trama, is an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

3. By threatening to discharge the crew of the Sandy Boy unless they became members of Seine and Line the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

4. By discharging the six named crew members on December 31, 1957 the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case I recommend that Mike Trama, his agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with loss of employment unless they join a particular labor organization.

(b) Discharging or otherwise discriminating in regard to the hire or the tenure of employment of any employee because he joins or fails to join any labor organization except in accord with the requirements of a collective bargaining agreement as authorized in Section 8 (a) (3) of the Act.

(c) In any other manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act except to the extent that

such right may be affected by an agreement requiring membership in a labor organization as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action:

(a) Offer to Antoine Affidi, Vincenzo Bulone, Frank Ferrara, Sal Lucca, Rosario Rizza and Nick Mudry, immediate and full reinstatement, each to his former job aboard the Sandy Boy without prejudice to seniority or other rights and privileges, discharging, if necessary, any replacements, and make each whole in the manner set forth in the section of this report entitled "The remedy."

(b) Preserve, and upon request, make available to the Board or its agents, for examination and copying all records of the Sandy Boy since January 1, 1958, indicating the extent of its fishing operations and the disposition of its catch and all other records necessary to an analysis of the amounts due under terms of this recommended order.

(c) Post aboard the Sandy Boy copies of the notice attached hereto marked "Appendix", copies of such notice to be furnished by the Regional Director for the Twenty-first Region. Such notice shall, after being duly signed by the Respondent, be posted by him immediately upon receipt thereof and be maintained by him for a period of sixty (60) consecutive days thereafter, in all places where notices to crew members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by other material.

(d) Notify the Regional Director for the Twenty-first Region in writing within twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order what steps he has taken in compliance.

It is further recommended that unless within twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order, the Respondent notifies the said Regional Director in writing that he will comply with these recommendations, the Board issue an order requiring him to do so.

Dated this 28th day of May 1959.

/s/ WALLACE E. ROYSTER,
Trial Examiner.

Appendix

Notice to All Crew Members Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, you are hereby notified that:

I Will Not discourage membership in Fishermen's Union, Local 33, ILWU, or in any other labor organization by terminating any crew member or by discriminating in any other manner in regard to hire or tenure of employment, or any term or condition of employment.

I Will Not threaten any crew member with discharge for failure to join Seine and Line Fishermen's Union of San Pedro.

I Will Not in any other manner interfere with, restrain, or coerce crew members in the exercise of their rights to self-organization, to bargain collectively through representatives of their own choice, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such rights may be affected by an agreement requiring mem-

bership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

I Will Offer to Antoine Affidi, Vincenzo Bulone, Frank Ferrara, Sal Lucca, Rosario Rizza and Nick Mudry immediate and full reinstatement to the positions they held before the discrimination against them, discharging if necessary, any crew member hired since January 1, 1958, without prejudice to seniority or other rights and privileges, and I will make them whole for any loss of earnings suffered as a result of the discrimination against them.

All crew members are free to join, form or assist any labor organization, or to engage in self-organization, or other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such rights are affected by an agreement made in conformity with Section 8 (a) (3) of the Act.

Dated .....

MIKE TRAMA (F/V SANDY BOY),
(Employer)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

United States of America
Before the National Labor Relations Board

Case No. 21-CA-2904

MIKE TRAMA (F/V SANDY BOY)
and
FISHERMEN'S UNION, LOCAL 33, ILWU

DECISION AND ORDER

On May 28, 1959, Trial Examiner Wallace E. Royster issued his Intermediate Report in this case, finding that the Respondent had engaged in and was engaging in unfair labor practices in violation of Section 8 (a)(1) and (3) of the Act, and recommending that the Respondent cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner as modified herein.

1. The Respondent excepts to the Trial Examiner's finding that jurisdiction should be asserted in this case under the Board's 1958 jurisdictional standards, contending that consideration should be given to the fact that its

conduct alleged to be unlawful herein occurred in 1957, when his operations did not satisfy the jurisdictional standards then in effect, and that as late as March 21, 1958, the Board refused to assert jurisdiction over his business.[1] However, in adopting the 1958 jurisdictional standards, the Board stated that it would "apply the revised jurisdictional standards to all future and pending cases."[2] At the time this policy was announced, the present case was pending on appeal to the General Counsel from the action taken by the Regional Director on March 21, 1958, in refusing to issue a complaint because the Respondent's operations did not meet the Board's jurisdictional standards. This exception, therefore, lacks merit.[3]

2. We agree with the Trial Examiner that the complainants herein were discriminatorily terminated on December 31, 1957. However, in the exercise of our administrative discretion as to the remedy most appropriate in the circumstances, we find that it will best effectuate the policies of the Act if the provisions in our Order, that the Respondent make whole the discriminatorily discharged employees for any loss of earnings on their part, are limited to the period between the date of the dis-

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[1]As the Board may take official notice of its own records and proceedings, particularly those pertaining to employees of the same employer, we grant Respondent's motion that official notice be taken of the fact that on March 21, 1958, his petition in Case No. 21-RM-471 was dismissed by the Regional Director for lack of jurisdiction. See Mount Hope Finishing Company, 106 NLRB 480, 483.

[2]Siemons Mailing Service, 122 NLRB No. 13 (Member Jenkins concurring specially).

[3]Wausau Building and Construction Trades Council (Heiser Ready Mix Company), 123 NLRB No. 172, on which the Respondent relies, is a clearly distinguishable case. In that case, the General Counsel revived a charge which he had properly dismissed under existing jurisdictional standards. In the present case, the General Counsel never affirmed the Regional Director's disposition of the charge.

crimination and March 21, 1958, when the Regional Director dismissed the Respondent's representation petition and refused to issue a complaint herein because of lack of jurisdiction, and to the period subsequent to February 27, 1959, when the complaint issued herein and the Respondent was informed that the Board was no longer adhering to the prior administrative determination with regard to jurisdiction over his operations.[4]

Order

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent Mike Trama, his agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with loss of employment unless they join a particular labor organization.

(b) Discharging or otherwise discriminating in regard to the hire or the tenure of employment of any employee because he joins or fails to join any labor organization except in accord with the requirements of a collective bargaining agreement as authorized in Section 8 (a)(3) of the Act.

(c) In any other manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized in Section 8 (a)(3) of the Act.

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[4]See The Baltimore Transit Company, 47 NLRB 109, 112-113, enf. 140 F. 2d 51 (C. A. 4).

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer to Antoine Affidi, Vincenzo Bulone, Frank Ferrara, Sal Lucca, Rosario Rizza and Nick Mudry, immediate and full reinstatement, each to his former job aboard the Sandy Boy without prejudice to seniority or other rights and privileges, discharging, if necessary, any replacements, and make each whole in the manner set forth in the Intermediate Report entitled "The remedy" for any loss they may have suffered between the date of the discrimination against them and March 21, 1958, and for the period subsequent to February 27, 1959.

(b) Preserve, and upon request, make available to the Board or its agents, for examination and copying all records of the Sandy Boy since January 1, 1958, indicating the extent of its fishing operations and the disposition of its catch and all other records necessary to an analysis of the amounts due under terms of this Order.

(c) Post aboard the Sandy Boy copies of the notice attached hereto marked "Appendix."[5] Copies of such notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by the Respondent, be posted by him immediately upon receipt thereof and be maintained by him for a period of sixty (60) consecutive days thereafter, in all places where notices to crew members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[5]In the event that this Order is enforced by a decree of the United States Court of Appeals, this notice shall be amended by substituting for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

(d) Notify the Regional Director for the Twenty-first Region in writing within ten (10) days from the date of this Order what steps he has taken in compliance.

Dated, Washington, D. C. Nov. 17, 1959.

BOYD LEEDOM,
Chairman

STEPHEN S. BEAN,
Member

JOSEPH ALTON JENKINS,
Member
National Labor Relations Board

[Seal]

Appendix

Notice to All Crew Members Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, you are hereby notified that:

I Will Not discourage membership in Fishermen's Union, Local 33, ILWU, or in any other labor organization by terminating any crew member or by discriminating in any other manner in regard to hire or tenure of employment, or any term or condition of employment.

I Will Not threaten any crew member with discharge for failure to join Seine and Line Fishermen's Union of San Pedro.

I Will Not in any other manner interfere with, restrain or coerce crew members in the exercise of their rights to self-organization, to bargain collectively through

representatives of their own choice, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a)(3) of the Act.

I Will Offer to Antoine Affidi, Vincenzo Bulone, Frank Ferrara, Sal Lucca, Rosario Rizza and Nick Mudry immediate and full reinstatement to the positions they held before the discrimination against them, discharging if necessary, any crew member hired since January 1, 1958, without prejudice to seniority or other rights and privileges, and I will make them whole for any loss of earnings suffered as a result of the discrimination against them as set forth in the Order.

All crew members are free to join, form or assist any labor organization, or to engage in self-organization, or other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such rights are affected by an agreement made in conformity with Section 8 (a) (3) of the Act.

Dated .....

MIKE TRAMA (F/V SANDY BOY),
(Employer)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Cause.]

MOTION TO TAKE OFFICIAL NOTICE OF PRIOR BOARD PROCEEDINGS

Now Comes Respondent, Mike Trama, and pursuant to Sections 102.47 and 102.48(b) of its Rules and Regulations, moves the Board to take official notice in this case of the prior proceedings in the Matter of the Boat Sandy Boy, Case No. 21-RM-471, based upon the following grounds:

I.

On May 28, 1959, Trial Examiner Wallace E. Royster issued his Intermediate Report (IR-(SF)-615) in the above-entitled case (No. 21-CA-2904), wherein he found inter alia that "jurisdiction exists and that the purposes of the Act will be effectuated by its assertion" (Intermediate Report, page 4, lines 21-24), based upon the authority of Siemons Mailing Service, 122 N.L.R.B., No. 13, decided November 14, 1958.

II.

Respondent duly excepted to said finding in his Exceptions to the Intermediate Report, dated June 18, 1959 (Exceptions, page 1, lines 19-22), as well as to the proposed "back pay" remedy based upon alleged loss of earnings commencing January 1, 1958. (Exceptions, page 2, lines 12-14) In support of his exceptions to this retroactive application of the Board's October 2, 1958 jurisdictional standards in this case, where the Board previously denied relief to him under its 1954 jurisdictional standards (cf. Intermediate Report, page 2, footnote 1), the Respondent duly cited the recent decision in Wassau Bldg. and Construction Trades Council, 123 N.L.R.B.,

No. 172, decided June 3, 1959. (Respondent's Brief in Support of Exceptions, page 2, lines 27-32)

III.

In the Siemons Mailing Service case, the Board respectfully declined to follow the decision of the United States Court of Appeals for the Ninth Circuit in N.L.R.B. v. Guy F. Atkinson Co., 195 F. (2d) 2518 and overruled its own prior decision in Almeida Bus Service, 99 N.L.R.B., No. 79, which followed the Ninth Circuit's ruling in Atkinson. The Board did not, however, expressly overrule its decision in the Baltimore Transit Company case, 47 N.L.R.B. 109, at pp. 112-113, enforced, C.A. 4th, 140 F. (2d) 51, 55, where it was held that dismissal of prior proceedings on jurisdictional grounds was not res judicata, but in the exercise of "administrative discretion" back pay and other financial reimbursement would be limited to the period since the data on which the complaint issued. (In the instant case, No. 21-CA-2904, the complaint did not issue until Feburary 27, 1959.)

IV.

In order to properly decide the issues duly raised by Respondent's Exceptions to the Intermediate Report relative to the matter of retroactive application of the October 2, 1958 jurisdictional standards, which involves a reconciliation of the Siemons Mailing Service decision with the Wassau Building Trades Council case and the Baltimore Transit Company case, as well as the Ninth Circuit's decision in the Atkinson case, the Board should not only have before it the fact that Respondent "was informed that he did not meet jurisdictional standards" in an 8(b)(4) case "in the fall of 1957" (Intermediate Re-

port, page 2, footnote 1), but also the fact that on March 21, 1958, the Regional Director at Los Angeles dismissed his representation petition in Case No. 21-RM-471 on similar grounds.

V.

By letter dated July 2, 1959, Respondent submitted to the Board a photostatic copy of his petition filed in Case No. 21-RM-471 and a copy of the Regional Director's letter of dismissal dated March 21, 1958, and requested the Board to take "judicial notice" thereof. This formal motion is filed by Respondent in accordance with advice received from the Board's Assistant Executive Secretary in a letter dated July 8, 1958, indicating the necessity for such a formal motion.

VI.

The Board will take official notice of its own prior proceedings involving the same parties in order to determine whether it would effectuate the policies of the Act to assert jurisdiction in a subsequent unfair labor practice case. (Haleston Drug Stores, Inc. 86 N.L.R.B., No. 125)

Dated: July 31, 1959.

/s/ HOWARD E. MILLER,
Attorney for Respondent Mike Trama

Affidavit of Service by Mail Attached.

[Title of Board and Cause.]

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.116, Rules and Regulations of the National Labor Relations Board—Series 8, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board and known upon its records as Case No. 21-CA-2904. Such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Stenographic transcript of testimony taken before Trial Examiner Wallace E. Royster on April 13 and 15, 1959, together with all exhibits introduced in evidence at the hearing.

2. Copy of Trial Examiner Royster's Intermediate Report and Recommended Order dated May 28, 1959 (annexed to item 6 below).

3. Respondent's exceptions to the Intermediate Report received June 22, 1959.

4. Respondent's motion to take official notice of prior Board proceedings received August 3, 1959. (Motion granted. See footnote 1, page 2 of Decision and Order).

5. Charging Party's opposition to motion to take official notice of prior Board proceedings received August 10, 1959.

6. Copy of Decision and Order issued by the National Labor Relations Board on November 17, 1959, with Intermediate Report attached.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 15th day of September, 1960.

[Seal] /s/ OGDEN W. FIELDS,
Executive Secretary
National Labor Relations Board

Before the National Labor Relations Board
Twenty-first Region

Docket No. 21-CA-2904

In the Matter of:
MIKE TRAMA (F/V SANDY BOY)
and
FISHERMAN'S UNION, LOCAL 33, ILWU.

Hearing Room 2, 849 South Broadway, Los Angeles, California Monday, April 13, 1959.

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock, A.M.

Before: Wallace E. Royster, Trial Examiner.

Appearances: Sherwin C. MacKenzie, Jr., 849 South Broadway, Los Angeles, California, Appearing as Counsel for General Counsel. Howard E. Miller, Esq., 821 South Pacific Avenue, San Pedro, California, appearing on behalf of Mike Trama. Ben Margolis, Esq., c/o

Margolis, McTernan and Branton, 112 West 9th Street, Los Angeles 15, California, appearing on behalf of Fishermen's Union, Local 33, ILWU, Charging Parties. [1]*

PROCEEDINGS

Trial Examiner Royster: On the record.

This is a formal hearing before the National Labor Relations Board in the matter of Mike Trama, Case No. 21-CA-2904. [3]

* * * * *

Mr. Miller: Your Honor, I don't know whether the motion should be made at this time, or before the first witness. However, the respondent party has maintained and still maintains that the complaint does not state any cause of action, and we would object to any admission of any evidence whether it be at this point or at a later point, based upon the fact that the complaint alleges only that there was $50,000 worth of jurisdictional business done here during the year 1958, the acts that they complain of occurred during the year 1957. [5]

Trial Examiner: I see.

Mr. Miller: It would be on that on that basis that we object.

Trial Examiner: In any event, we don't have a clerk's file, so this would have to come in. And, actually, for you to have something to refer to to base your objection upon. [6]

* * * * * *

Mr. Miller: Your Honor, I think that at this point, inasmuch as Mr. MacKenzie is obviously starting his

*Page number appearing at top of page of Original Transcript of Record.

case, I would have to renew my objection based upon the fact, as I have said, that the complaint alleges only during 1958 that there was any business done by any of the parties hereto, and the act complained of took place prior to any commerce being done, and, therefore, we say the complaint does not state a sufficient cause of action to enable this Court to proceed.

Trial Examiner: What do you say to that, Mr. MacKenzie?

Mr. MacKenzie: I say that as we develop the record, sir, it will appear that the particular boat that we are concerned with, the Sandy Boy was built in the summer of '57, and first went fishing briefly in September of 1957 when it was thereafter prevented from fishing by a labor dispute, and did not actually begin to fish regularly [7] until the calendar year 1958. And, therefore, we feel that the calendar year 1958 is a proper representative period within the Board's jurisdictional requirements.

Trial Examiner: Well, how do you get jurisdiction over an employer in '57, when he wasn't doing any business, and could not have been in commerce?

Mr. MacKenzie: We feel that in the first place, sir, I think Siemons Mailing Service covers the general problem, that he did not meet the Board's then existing standards. I think—

Trial Examiner: Did he meet any kind of standards then it he wasn't doing any business?

Mr. MacKenzie: In the fall of '57, no. However, he subsequently during the calendar year '58 he did meet our standards. And we can show that in the fall of '58 he would have the business he did in the fall of '58 as an example compared to what he would have done in the

fall of '57, had he not been precluded from doing business by this labor dispute, which we will develop later; he would have met the standards.

Mr. Margolis: May I say a couple of things. First, the boat did do business in '57, as the evidence will show. Second, if you will look at Paragraph 10 of the complaint, you will see that it alleges that on or about January 2, 1958, Respondent discharged the following employees and [8] thereafter failed and refused, and does now fail and refuse to reinstate them to their former, or substantially equivalent positions of employment.

It seems to me that in and of itself is a complete case.

Trial Examiner: Of course, there are unfair labor practices alleged prior to 1958.

Mr. Margolis: Right, but this is a continuing course of conduct which was carried on from 1957, and the impact of the unfair labor practices and the remedy would be in 1958. For example, it would seem to me, let us assume that you had situation of a plant that had never done business and beginning to hire people, they did so discriminatory in manner, and the hired and were in commerce. They wouldn't affect, the unfair labor practices would not be remedial until they were in commerce, but it would be evidence and admissible in evidence what they had done in the process of opening the plant to create unfair labor practices, the situation that existed after they were in commerce.

Actually here the discharges and remedies are with respect to matters that occurred really in 1958, although the sequence of events really started in 1957.

Trial Examiner: I would overrule the objection, but I don't intend to dispose of the matter. I am going to take your objection under consideration in the full record.

Mr. Miller: May I make a comment? The position of the [9] Board and Mr. MacKenzie is a unilateral one, and it is unfair to Mr. Trama inasmuch as if Mr. Trama had sought, and he did seek the aid of the National Labor Relations Board in September, October, November of 1957, he would have been, and was refused the help of the National Labor Relations Board on the basis that he could not prove he was doing any business under commerce. Now, a year and a half later we are in the reverse position that we are now on the responsive end, when we were denied the right to be on the initiatory end. It doesn't seem proper nor fair as far as Mr. Trama is concerned in a hearing of this nature.

Trial Examiner: Well, as I indicated, I am going, I will overrule the objection at the moment and let the evidence come in, but I do not intend to dispose of your objection by that ruling. I will consider it on the record. [10]

* * * * *

MIKE TRAMA,

a witness called under Rule 43(b), having been first duly sworn, was examined and testified as follows:

Cross-Examination

* * * * *

Q. Prior to 1957, or the summer of '57, Mr. Trama, were you not the skipper and owner of the fishing boat Fisherman? [11]

A. Yes, I was. [12]

* * * * *

Q. All right, Mike, we will make it more definite. Let us say June of 1957, who were the crew of the Fisherman?

(Testimony of Mike Trama.)

A. Well, Vince Bulone, Sal Lucca, myself, Rosario Rizza, and I think my uncle Mike Trama at the time.

Q. That was Vince Bulone, Sal Lucca?

A. Rosario Rizza.

Q. Rizza? A. And Mike Trama.

Q. That is a different Mike Trama?

A. That is right.

Q. Now, how about Antoine Affidi, was he on the crew of the Fisherman in the summer?

A. I would have to check, Mr. MacKenzie, because I think Mr. Affidi came in later after June. I am not positive, I would have to check my record on that. I don't remember.

Q. All right. Now, how long was Vince Bulone a part of the crew prior to June of 1957?

A. Well, I think it was about six months because the previous year, or about eight months, he went to Alaska for a period of time. I don't recall, I mean, I would say from six to eight months. [13]

Q. All right. Was he on the Fisherman before he went to Alaska? A. Yes, he was.

* * * * *

Q. Now, how about Sal Lucca, how long prior to June of 1957 was he on the Fisherman?

A. My memory is not that good. I would have to check the record.

Q. Was it a year, more than a year, less than a year?

A. It could average from six months to one year, I don't know, something like that. [14]

* * * * *

Q. How long was Mr. Rizza crew on the Fisherman?

(Testimony of Mike Trama.)

A. Prior, you are talking about prior to June?

Q. Prior to June of '57?

A. Oh, I would say about seven months, six, seven months. [15]

* * * * *

Q. Now, Mr. Bulone, Mr. Lucca, Mr. Rizza and Mr. Affidi they were on the Fisherman about June of 1957, isn't that right?

Trial Examiner: He has already testified that Mr. Affidi was not there in June of '57.

Mr. MacKenzie: I think he said he wasn't sure, sir.

The Witness: Well, Mr. MacKenzie, I would have to check the record. I mean, whether it was July or June, or it was in August when he come in, I would have to go into the record, I don't know. [16]

* * * * *

Q. (By Mr. MacKenzie): Now, when you had the Fisherman, Mr. Trama, prior to June of 1957, you had a contract with the Seine & Line Fishermen's Union, isn't that right? A. That is correct; yes. [17]

* * * * *

Mr. Miller: Your Honor, then I will object to that if he is talking of the contract as not being the best evidence to ask this witness.

Trial Examiner: It is a good objection, I will sustain it.

Mr. MacKenzie: Very well.

Q. Mr. Trama, from your own knowledge, were your crew of the Fisherman in June of '57 and prior thereto members of Seine & Line, or permit holders of Seine & Line Union?

Mr. Miller: Your Honor, I am going to object as

(Testimony of Mike Trama.)

calling for a conclusion of this witness, asking him to testify as to the records of a union over which he has no control.

Mr. MacKenzie: I asked for his knowledge.

Trial Examiner: Yes, I will overrule the objection. You may answer.

The Witness: Well, as far as I know I was paying dues to the Seine & Line Fishermen's Union, yes. I mean, such as the dues and stuff.

Q. (By Mr. MacKenzie): That is dues for these men, right?

A. Right, because I had a contract with the, with that union. I had to give that whatever deductions were made from [18] this man to that union, yes.

Q. And Mr. Lucca, and Mr. Rizza, and Mr. Bulone all had their dues, you paid their dues to Seine & Line?

A. That is correct, yes.

* * * * *

Q. (By Mr. MacKenzie): Did you start building a new boat the Sandy Boy in the spring of 1957?

A. Yes, I did. [19]

* * * * *

Q. When the Sandy Boy was being built, did the crew of the Fisherman work on the Sandy Boy while it was being built?

A. Yes, they did some help on building the boat. [20]

* * * * *

Q. (By Mr. MacKenzie): Do you recall having an oral understanding with the crew of the Fisherman that when the Sandy Boy went fishing they could go as crew if they helped work on the boat?

(Testimony of Mike Trama.)

A. Well, we had an understanding as far as that they were going to come and fish on the bigger boat because more, you know, better opportunity to make more money, more accomodation, and we had understanding with them that they were going to come fishing on the boat, yes.

* * * * *

Q. Did they give you a hand building the boat?

A. Yes, they did; yes.

Q. I see. And isn't it a fact that since they had been good fishermen on the Fisherman that you wanted them [21] to come along when the Sandy Boy was built?

A. Well, it is right, yes.

Q. Do you recall just about when the Sandy Boy was finished, Mr. Trama?

A. Well, I think we launched it some time during September 6, or right around that particular date.

Q. This was in 1957? A. '57, yes.

* * * * *

Q. (By Mr. MacKenzie): What was the situation in San Pedro Harbor with regard to the two fishermen's unions when you launched the Sandy Boy?

A. You want my opinion, too?

Q. Between the Seine & Line Union and Local 33, not your opinion as to the unions, but what was the circumstances, wasn't there a labor dispute? [22]

A. As far as I knew, and as far as I can recall is that the two unions were trying to overtake one another, as far as I can get it. I mean, don't go definite on this, and there was troubles in setting the price, and trying to get a price between the two unions. When one agreed to a certain price, and another one agreed to another

(Testimony of Mike Trama.)

price, and seemed like to me one union was trying to take their members from one union, the other union was trying to do the opposite, that is the way it seems like to me, it could be. [23]

* * * * *

Trial Examiner: Any time during the month of September.

Mr. MacKenzie: Right. He wanted to go fishing with his new boat, what were the circumstances as far as the union was concerned?

The Witness: As far as I recall, when we first launched the boat they were negotiating a price on sardines. I mean, when I say they, I mean the co-op, I am not saying the union, the co-op was trying to get a price from the canneries so they could present it to the members.

Q. (By Mr. MacKenzie): Both Seine & Line Union and Local 33 their members weren't fishing, right?

A. That is correct, yes.

Q. Do you recall after the, or just about the time the Sandy Boy was launched you went and spoke with Mr. John Calise, the secretary business agent of Seine & Line and asked him about a contract covering the Sandy Boy? A. Yes, I did.

Q. Do you recall what Mr. Calise said? Didn't he tell you, that because of the dispute he wouldn't sign a contract, or he wouldn't give you a contract covering the Sandy Boy?

A. No, he didn't say that at all.

Q. What did he say? [24]

A. As I remember correct, he says, that the contract was valid on the Fisherman, he extended to the

(Testimony of Mike Trama.)

Sandy Boy, extended to the Sandy Boy. In other words, he claimed that the contract that I had with him on the Fisherman had followed me, or followed both, I still never know the right answer to that. [25]

* * * * *

Q. About the time that the Sandy Boy was launched, did you obtain a contract from Franco-Italian, the cannery concerning deliveries of fish? A. Yes, I did.

* * * * *

Q. Using that time that you got a contract with Franco-Italian as a reference point, Mr. Trama, will you tell us about when that was in relation to the time you launched the boat, and the time you went fishing? In other words, was that before you went fishing, or after?

A. No, I think I got the contract on, I say about two weeks after the boat was launched, somewhere around that. [32]

* * * * *

Q. Yes. All right. Now then, did you talk with Mr. Calise of Seine & Line concerning a contract covering the Sandy Boy after you got a contract with the cannery? A. Yes, I did.

Q. All right. Will you tell us what was said?

A. Well, as I remember that, when I got this particular contract from Franco-Italian I went to see John Calise at his office, and at the time he was involved with some kind of employment men from the state regarding the member getting some kind of unemployment insurance, or whatever it was, so I went to talk to him. And as he was walking out of the door, I asked him, John, I says, "I have a contract from the cannery guar-

(Testimony of Mike Trama.)

anteeing me $80 a ton and $55" or whatever the price happened to be at the time that one of the unions was asking. I says, "This cannery wants to pay the full amount, will you tell us—" I says, "Will you tell us go fishing, and sign a contract with you" I says. And he replied, and he says, as he was walking out the door, he says, "I will not give you a contract, and not even if you get $150 a ton for your fish", he says. He says, "You can't go fishing you cannot go fishing". [33]

* * * * *

Q. (By Mr. MacKenzie): Was the fishing fleet tied up, Mr. Trama, at this time? A. Yes, it was.

* * * * *

Do you know why?

The Witness: Well, the why is this, that the boat owners, it seemed to me that the boat owners have accepted a price of $55 a ton for sardines, and due to the fact that the ILWU was, oh, I don't know what words to use for it, they were demanding $80 a ton for sardines, which was a ridiculous [34] price at the time maybe, I don't know, and while they were asking $80 a ton, the boat owners I think they already accepted $55 a ton, that doesn't mean that the union accepted the $55 a ton. So they were going to have a meeting to see whether they were going to accept this $55 a ton. Every time it seems like they were trying to have a meeting they had disruption, they had arguments, they had fights. What ever it was, we just heard about these things, that there were fights between the two unions. That is all I can say. I am not going to go into what their reasons were. I don't know.

(Testimony of Mike Trama.)

Q. (By Mr. MacKenzie): So, as a result of this conversation with Mr. Calise then, Mr. Trama, you were not able to sign a contract with Seine & Line?

A. Well, I must say this. Well, I went to talk with Calise, there were a couple of guys with me that they heard him say that—may I say their names maybe later on?

Q. Sure.

A. I think Mr. Nick Mudry was with me, and I think Vince Bulone happened to be at the time that Mr. Calise said such words. I don't remember whether anyone else was with me at the time or not. [35]

* * * * *

Q. (By Mr. MacKenzie): I just asked you, do you recall having a conversation with Mr. Columbic and Mr. Royal, two or three days after you entered into the contract with the cannery?

A. I recall the conversation before and after, yes.

Q. It all depends, I am talking about the one you had two or three days after you had the contract with the cannery. A. Yes, I recall that. [40]

* * * * *

Q. Do you remember saying that you are interested in going fishing, and you have a contract, what should you do?

A. Yes, I remember telling them that I had a contract. And he says that in order for me to, he says, to do anything with your contract, he says the majority of your crew has to be members of this union. [41]

* * * * *

(Testimony of Mike Trama.)

Q. Mr. Columbic showed you that these three men had signed check-off for Local 33?

A. That is correct, yes.

Q. Thereafter you entered into a contract with Local 33? A. Yes, I did. [42]

* * * * *

Q. (By Mr. MacKenzie): All right, Mr. Trama, do you recall now that after signing the contract on September 27, 1957, you took the Sandy Boy fishing the evening of that day with Mr. Bulone, Mr. Mudry, Mr. Farrara, your brother Tommy and yourself as crew? [44] A. Yes, I did.

Q. Do you recall that you brought in a load of fish to the cannery the next day?

A. Yes, I do recall it.

Q. When you arrived at the cannery there was a picket line outside the cannery?

A. Yes, there was two picket lines set by the AF of L.

Q. Do you recall that their banners said something about someone was unfair, and they were referring to the Sandy Boy?

A. Something like that, yes. I don't know what the—

Q. (Interposing) and these pickets were from the Seine & Line Fishermen's Union?

* * * * *

Q. (By Mr. MacKenzie): Didn't the sign say, AFL-CIO, or Seine & Line Union?

A. Yes, it did.

Q. Didn't they refer to the Sandy Boy, the sign say something about the Sandy Boy?

(Testimony of Mike Trama.)

A. Something was unfair. I don't remember the exact words [45] were, your know, in that picket line, but it said something being unfair.

Q. Did you have any, do you recall Mr. Calise from Seine & Line coming to the dock at the cannery while you were waiting to unload, and Mr. Calise telling you that this picket line was his picket line, that Seine & Line was picketing your boat?

A. I remember he came on the dock, but that was later after we were tied up for about three hours on the wharf, yes.

Q. As a result of this picket line, you wouldn't—

A. (Interposing) the cannery refused to touch the fish on the grounds that there was a picket line there. The minute they would touch our fish the cannery workers would walk out and they wouldn't handle the fish.

Q. That is right. Right after you had been held up for two, three hours by this picket line, Mr. Calise came to the dock? A. That is correct.

Q. And Mr. Calise told you that he was firing you, or he was charging you with firing two men that belonged to his union, do you remember him telling you that?

A. No. As I recall, I think he said that he represented the boat, he represented the crew on our boat.

Q. That is referring to Sandy Boy? [46]

A. Sandy Boy, yes. And he also said something too that where he said that I left two men on the beach, where he says that I lad them off, which that wasn't true at all.

Q. Which two men was he referring to?

A. He was referring to Nino Affidi and Sal Lucca.

(Testimony of Mike Trama.)

Q. I see. Had you laid off Mr. Lucca and Mr. Affidi?

A. No. They were scared to come fishing due to the fact there was so much threats out at the wharf, they were afraid they were going to get *their busted* if they went fishing.

Q. Now, don't you recall that after a few hours the picket line left, and you were able to give your fish to the cannery? A. Yes, I remember very well.

Q. Don't you remember that the next night you went fishing again, and Mr. Lucca and Mr. Affidi came along, they joined the crew? A. Yes, they did.

Q. They hadn't fished the first night, but they fished the second night? A. That is correct.

Q. And Sandy Boy fished after that for several nights?

A. As I recall, I think we fished five or six nights.

Q. And you brought in loads of fish and gave them to the cannery? A. Right. [47]

Q. And the cannery took the fish?

A. That is right.

* * * * *

A. Yes, we fished for five, six nights, yes.

Q. You sold fish each night?

A. Right, that is correct.

Q. After that there was a five-day lapse because of the full moon? A. That is correct, yes.

Q. And then the next load of fish you brought in was about October 17.

A. Well, we had laid off more than what the period had called for the full moon due to the fact that we

(Testimony of Mike Trama.)

thought maybe the two unions were going to settle the price, and we waited till the rest of the fleet go out. And then I think it was, you say what, it was the 16th, the night of the 16th or the night of the 17th we resumed fishing again.

Q. But you didn't fish for several nights after the full moon period was over?

A. No, we had stopped period during the full moon, you can't fish during the full moon.

Q. Right. There was a few more nights that you didn't [48] fish? A. That is correct.

Q. And you didn't fish those few more nights because you understood from the cannery that they wouldn't take your fish?

A. No, I didn't get that right away, I got that later.

Q. All right. Then you did go fishing though on the night of the 17th, or, yes.

A. Yes, I think it was the 17th, something like that.

Q. And you brought in a load of fish, and when you got there the cannery, Mr. Mardesich, the fleet manager of the cannery told you that he wouldn't take your fish.

A. Well, it wasn't a load of fish, it was a portion of a load. There was about—

Q. (Interposing) 15 tons, wasn't there, about?

A. I think it was 7 tons the first time, seven or 14 it could be, you could be right on 14, you know.

Q. Anyway, Mr. Mardesich, Andrew Mardesich, the fleet manager for Franco-Italian told you he couldn't take the fish? A. Yes, that is correct.

Q. And you asked him why he wouldn't take the

(Testimony of Mike Trama.)

fish, and he said that the cannery workers would walk out on the cannery?

A. Yes, he said that they had a letter from the Cannery Workers Union which is affiliated with the, I guess it is [49] AFL-CIO.

Q. That is right.

Q. It said, they had a letter that if they would take fish from my boat, they would pull the cannery workers out of the cannery.

Q. Do you recall Mr. Mardesich saying that he couldn't unload your fish because your fish was hot cargo according to the union?

A. Well, he mentioned something like that, meaning that he couldn't touch it because it was according to the union it was hot cargo or something like that.

* * * * *

Q. Now, do you recall, Mr. Trama, that in the week after the 17th when the cannery refused to take your fish that you went to Seine & Line and talked with Nick Pecoraro? A. What was that date again?

Q. This was in the week following the 17th when the cannery refused the fish, do you recall going and talking with Mr. Pecoraro?

A. Yes, I remember having a conversation with him. I can't remember the exact— [50]

* * * * *

Q. He works for the union, right?

A. Yes, he does.

Q. Do you recall telling Mr. Pecoraro that the union shouldn't stop you from fishing, but you had a contract with the ILWU?

(Testimony of Mike Trama.)

A. Yes, I told him that these men they wanted to be represented by the ILWU, and I says, therefore, I says, we enter into a contract with the ILWU. I says, why should you stop us from delivering fish? And every time I get around to try to get an answer from them, they walk away, I never get an answer.

Q. Do you recall that he said that in order for you to fish you would have to sign a contract with Seine & Line?

A. This was later on where, you know, they arrived to where they thought they still have me under contract with AF of L even though I didn't know anything about it, they claimed that the contract from the fisherman followed me to the next [51] boat. And they claimed that by doing so, he says, that I would still, I would still have to be, you know, signed contract with AF of L in order to go fishing.

Q. But do you recall Mr. Pecoraro telling you when you talked with him in the week after the 17th when the cannery refused the fish that you would have to sign a contract with Seine & Line in order to go fishing?

A. Well, Mr. MacKenzie, I don't know the date, because you see, during that time these men entered into a lawsuit.

Q. All right. You don't recall that date. Do you recall talking with Mr. Calise during this date after the cannery refused the fish? A. Yes.

Q. You asked him, John— A. Yes.

Q. "John, why are you stopping me, and what do I have to do to go fishing." [52]

* * * * *

(Testimony of Mike Trama.)

Q. Do you recall talking with Mr. Calise during the week after the cannery refused the fish on October 17th?

A. Well, I recall seeing Mr. Margolis here one time before I went to see John when we were stopped. Let us go into this—

Q. My question was, do you recall talking with Mr. Calise?

A. Yes, that was after I had the conversation with these people here with the ILWU and Mr. Margolis.

Q. We will get to that in a minute, but in the meantime do you recall talking to Mr. Calise?

A. Yes, I do recall it.

Q. You asked him why he was keeping you from fishing, do you recall that?

A. Well, as I recall it, he says that the guys were his members, and that he said he was going to—

Q. Answer the question first. A. I am.

Q. No. Do you recall asking him what you had to do to go [53] fishing?

A. That is what I am trying to answer.

Trial Examiner: Did you ask him that?

The Witness: Yes, I did.

Q. (By Mr. MacKenzie): Do you recall he said that the crew would have to go back to the AF of L?

A. He said that the crew would have to go to the AF of L, and he claimed that the ILWU has raided his men. Now, that is the words that he used. He said that the ILWU got his men when he was short, or something like that, he still claimed that the men were AF of L.

(Testimony of Mike Trama.)

Q. Do you recall him saying that there was going to be a fine for the crew, and that they would have to get straightened out with him before you could go fishing?

A. He said that the men would have to be reinstated, and whatever the Board desired, if there be a fine for them to pay it to the union. He says, yes, I remember that. In other words, he said, you had to bring them before a board and see what the board would decide on them. But, he said, it will probably be a fine.

Q. Before they would go fishing they would have to get straightened out with the union before you could go fishing?

A. Would you, let's see what you are trying, give me that question again. Don't break it up in pieces because I don't know, I don't get it. I am getting confused here. [54]

Q. He said that the crew, do you recall him saying that the crew would have to get straightened out with Seine & Line before you could go fishing?

A. Yes, I think he did say that; yes.

Q. During this same week, the week after October 17, do you recall talking with Mr. Gomez of the Cannery Workers Union, and asking him why you couldn't go fishing?

Mr. Miller: I think that is Mrs. Gomez.

The Witness: That is a Miss.

Mr. MacKenzie: My apologies. Miss or Mrs. Gomez?

A. Yes, we went to have a conversation with, I think

(Testimony of Mike Trama.)

Mr. Mudry was with me at the time we went to see her.

Q. Do you recall that Mrs. Gomez told you you have to see Mr. Calise?

A. Miss Gomez told, she says that she couldn't do anything about it, it was all up to Calise. I told her, why is it up to Calise when you people told the cannery that you wouldn't accept my fish. What seems to be the trouble, I says and she referred me to John Calise, go see Calise.

Q. During this week after the cannery refused your fish, do you recall talking with Mr. Andy, Andrew Mardiesich, the fleet manager for Franco-Italian?

A. I had several talks with him, probably due, yes, I remember that.

Q. You asked him why he wouldn't take the fish? [55]

A. Yes, I did.

Q. And he said he couldn't because the cannery workers wouldn't let them take the fish?

A. That is correct.

Q. Mr. Trama, do you recall that after you had talked with Mr. Calise and he told you that the crew would have to get straightened out with the union, did you then have any conversations, do you recall any conversations or talking with the crew about getting straightened out with the union, the Seine & Line union?

A. Well, as I got the message from Calise I had, you know, like mental person, the reason why I can't go fishing is this, this is what the AF of L wants us to do, yes.

(Testimony of Mike Trama.)

Q. Do you recall then, Mr. Trama, that you told the crew, Mr. Bulone, Mr. Affidi, Mr. Lucca, Mr. Rizza and Mr. Mudry that the only way you could go fishing, that they could go fishing was to get on the good side of the Seine & Line? [56]

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Q. (By Mr. MacKenzie): Just answer the question did you tell the crew, did you say to the crew that the only way you could go fishing was if they got straightened out with the Seine & Line? A. Yes, I did.

Q. The only way all of you could go fishing was if they got straightened out with Seine & Line?

Trial Examiner: Did you want to explain that?

The Witness: Yes, Your Honor, I want to explain it because [57] these men here, they needed the money as much as I did, me building a boat, and them being as one man, they wanted to go to work and make some money, so they were just as interested as I was to go fishing. So they told me to do what I can in order to get this boat fishing. So I went step by step going from Mrs. Gomez to Calise, from Mr. Margolis to John Royal, from John Royal to Calise and back and forth. And the only, we couldn't get no outs in order to go fishing at all. Even at the time we even tried to come up here to the National Labor Relations Board to get some help with this particular thing, see whether we could get some kind of release to go fishing, and we couldn't obtain no help from nobody. So, as I went back to John Calise and asked him what we had to do in order for him to release us. Of course, I had to let these men know. But what could be done, I mean,

(Testimony of Mike Trama.)

I wasn't telling them to do it, but I was referring to them what step we could take in order to go fishing.

Q. (By Mr. MacKenzie): Do you recall saying to the crew that they could go fishing, the only way you could get the Sandy Boy released was if they joined Seine & Line, Calise would only release the boat to fish if they joined the Seine & Line?

A. If they got reinstated in the union, yes, that is what he said. [58]

Q. (By Mr. MacKenzie): Did Mr. Bulone say that he didn't want to be, he didn't want to go back to Seine & Line?

A. Well, I don't remember whether he said definitely not, or whether he said that if we didn't have to pay no fine or anything I will go back, or something like that; some kind of discussion like that went on.

Q. He didn't go back to the Seine & Line, did he?

A. He didn't, no.

Q. Did Mr. Affidi say that he wouldn't go back to Seine & Line?

A. Yes, he said he wouldn't go back.

Q. Did Mr Lucca say that he wouldn't go back?

A. Well, they all followed suit, in other words, one guy [59] said no, they all stuck together like that.

Q. All of the crew told you that they didn't want to go back to Seine & Line? A. That is correct.

Q. All right. Did you then go to Calise and tell him that the crew didn't want to go back to Seine & Line? Did you then tell Mr. Calise that the crew didn't want to go back to Seine & Line?

A. No, I didn't tell him anything, we just tied the

(Testimony of Mike Trama.)

boat up. That was before, this is the question, no, I didn't go to see Mr. Calise.

Q. Didn't you tell Mr. Calise that the men weren't willing to go back to Seine & Line?

A. I don't think I told Calise, maybe I told Nick or somebody else; I told somebody they wouldn't go.

Q. Did you tell someone from Seine & Line?

A. Yes, I did.

Q. Do you recall whether it was Mr. Calise?

A. I don't recall who it was, but I remember telling one of the guys, [60]

* * * * *

Q. Do you remember saying that to Mr. Calise?

A. I told Calise, and I told it to one of his executives there, whatever it was.

Q. That the crew weren't willing to come back to Seine & Line? A. Yes.

Q. Do you recall him saying that in order to go fishing you would have to come back in the AF of L and get the men [61] to agree?

A. I said in order for you to go fishing, he says, you have to get reinstated in the union again.

Q. And get the men to agree?

A. Yes, he say for me to get the men to agree, he says they have to.

Q. Do you recall that he said that you should get the men to agree to come back to AF of L, he said that?

A. Yes, he said something like that where the guys would have to come back and get reinstated.

* * * * *

Q. Mr. Trama, do you recall that Mr. Calise told

(Testimony of Mike Trama.)

you that the crew would have to come back to the AF of L, and you should get the men to agree, or get a crew that would agree?

A. Yes, that is what he said all right. [62]

* * * * *

Q. (By Mr. MacKenzie): Mr. Trama, going back to October 17 when the Sandy Boy brought in a load of fish and the cannery Franco-Italian wouldn't take it, is that right? A. That is correct, yes.

Q. Do you recall that for about a week after that you didn't fish? A. Yes, I do.

Q. Then you went out and you tried, you fished again and brought in another load, and do you recall the cannery wouldn't take the fish either?

A. That is correct.

Q. They wouldn't take it for the same reason that the cannery workers wouldn't handle it?

A. That is correct.

Q. Did you try and fish any more after that, Mr. Trama?

A. No, we didn't think it was any more use to try to fish because every time we bring in a load, why, it would just spoil. [64]

Q. You kept in contact with Mr. Mardesich, and he told you every time you spoke with him that the cannery workers still wouldn't let you take, wouldn't let them take the fish? A. That is right.

Q. All right. Do you recall, Mr. Trama, that about the end of October, on October 28 to be exact, the crew, that is, Mr. Lucca, Mr. Bulone, Mr. Affidi, Mr. Farrara and Mr. Rizza and Mr. Mudry brought suit against you and the Franco-Italian Packing Company, and Seine &

(Testimony of Mike Trama.)

Line Union, and the Cannery Workers Union, and several individual officers of the various unions for damages for loss of earnings?

Mr. Miller: Your Honor, I am going to object to that, he is calling for a conclusion of this witness. I will stipulate that a suit was filed on that day, but not that Mr. Trama knew that it was filed.

Mr. MacKenzie: All right. Nevertheless, we will stipulate then that the suit was filed on that day.

Mr. Miller: Yes. [65]

Q. (By Mr. MacKenzie): You recall, don't you, Mr. Trama, that within a day or two after the suit was filed about the end of October, you became aware the crew were suing you and the cannery and all the rest?

A. Yes, I was aware to it.

Q. This is along about the end of October?

A. Oh, long and before that.

* * * * *

Q. (By Mr. MacKenzie): Do you recall, or you recall, don't you, Mr. Trama, after the filing of the suit talking with Mr. Calise, and he told you that before he would let the boat go fishing the crew would have to join the Seine & Line, and each man would have to pay a $300 fine, and they would have [67] to drop the suit. A. You mean after the suit was filed?

Q. That is right, after the suit was filed?

A. Yes, he said something like that where he says as long as this crew was going to sue the cannery workers and myself and you and so forth, we don't feel obligated in packing the fish. In other words, he said, his union was not going to handle the fish.

Q. He added that they would have to pay a $300

(Testimony of Mike Trama.)

fine and come back to the AF of L before he would let you fish?

A. He said some kind of fine, I forgot what it was.

* * * * *

The Witness: No, I never directed them, no. The only [68] thing I was doing is whatever was said to me, whatever we could do to go fishing, I would just pass it on to them, but I never said that they had to do it, or have to do it, no. [69]

* * * * *

Trial Examiner: All right. In the light of that answer then, did you say anything to the crew about getting straightened out with Seine & Line?

The Witness: Yes, whatever Calise told me that is what I passed on to the crew as he wanted it. He never said what I wanted them to do, it is whatever the union wanted us to do in order to get straightened out.

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Trial Examiner: Just what did he say, did he say this [70] to the crew that they had to get straightened out with the Seine & Line Union in order to fish?

The Witness: I said that we would all have to get straightened out, I just didn't say that they would have to go, I said we all had to get straightened out with the AF of L.

Trial Examiner: In order to fish?

The Witness: In order to fish, yes. [71]

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Q. (By Mr. MacKenzie): Do you recall that the cannery got an injunction against the Cannery Workers Union?

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(Testimony of Mike Trama.)

The Witness: Yes, I remember getting an injunction, yes.

Q. (By Mr. MacKenzie): After that injunction did you go fishing? A. Yes, we did.

Q. Did the cannery take the fish?

A. Well, the season was about over then.

Q. Did the cannery take the fish?

A. I don't know whether we had one or two deliveries because it was right near the end of the season.

Q. But you recall you had at least one delivery?

A. I think so, yes.

Q. And the cannery took it? A. Yes. [73]

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Q. (By Mr. MacKenzie): Mr. Trama, do you now recall telling the crew after they filed this suit against you, and before the injunction, that because the sardine season would be over in December, and you didn't know what you would, what you would do with the boat, and might sell it, then they should look for other employment?

A. Yes, I told them that. Can I explain something at this point? A. Yes.

Trial Examiner: If it has to do with your answer, yes.

The Witness: Yes, it has, because at this time all of these fellows except Mudry, and maybe Affidi, they went to work on another boat, and because they went to work in another boat they had some trouble with the union, too where certain stoppage was, in other words, they stopped this other boat from delivering fish until such time that this fellow tried to get an injunction to stop one thing or another, and they were released.

(Testimony of Mike Trama.)

And then, you know, I didn't see them until later time, and I told them that at the end of the year. [77]

Mr. Margolis: May I interrupt. I move to strike the answer as not responsive, and it is hearsay; no foundation.

Trial Examiner: I will let him finish the answer, and then I will rule on your motion. Go ahead.

The Witness: These fellows went fishing with another boat because of the troubles we had with this union. They were also stopped on this other boat for a night or two, or whatever it was, and then the owner of the boat got some release for these fellows to fish, and they did. And as they got a job on another boat, and I told them the Sandy Boy was going to be tied up until the season, you know, until the season was on, or after, I says, we can't go fishing. I said, if we can't fish after the season, I says, you fellows go ahead and get another job on another boat. [78]

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Q. (By Mr. MacKenzie): Isn't it a fact, Mr. Trama, that you were telling the crew this, that as of that time that you were not going to rehire them at the end of the season?

A. At what time, Mr. MacKenzie?

Q. When you told them that because of the suit you didn't want them back, weren't you telling them that then as of that time you weren't going to hire them at the end of the season? [79]

A. Yes, I told them that they couldn't at the end of the season they wouldn't be hired again for the coming season, but I said if the boat gets released in any

(Testimony of Mike Trama.)

way that we will finish out the season, they were going to come back on the boat.

* * * * *

Weren't you telling them this so that they could look for other jobs prior to the start of the mackerel season? A. Yes, I did.

Q. Didn't you also tell them that you didn't want them back in the mackerel season because the Seine & Line still might say they were unfair?

A. No, I didn't say that. I said that as long as they were going to sue me and we are going to have to live together, I said it is not a good practice, it wasn't in good harmony that we still fish in the same boat. That was one of my reasons for discharging these men. [80]

* * * * *

Was one of the reasons you discharged the crew because if you kept them in the mackerel season you still might not be able to fish if the Seine & Line said they were unfair?

A. That was one of the reasons, I would say yes. [82]

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Q. (By Mr. MacKenzie): Did you tell the crew on the 27th or 28th of December, Mr. Trama, that they had the suit against you, and because the season was over and they were suing you, that as long as they were going to sue you, you were going to discharge them because—you were going to discharge them?

A. Well, yes, that the season was over, and due to the fact they brought the suit for it, and I told them

there wouldn't be any harmony on the boat, and I told them to look for other [83] employment.

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Q. (By Mr. MacKenzie): Do you recall who was there, Mr. Trama?

A. Yes, I do recall, it was Vince Bulone, Mike Farrara, Sal Lucca, and I think possibly Rosario Rizza, was present, and Mr. Mudry and Mr. Affidi wasn't there. [84]

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Q. (By Mr. MacKenzie): Mr. Trama, did you send any letter to anyone else besides those four? [85]

A. Yes, I sent a letter to Mr. Mudry too, even though he wasn't—

Q. Mr. Mudry's letter is included in there, there is no letter for Rizza or Affidi.

A. Well, I think there is, yes, should be.

Q. Well, did you send letters to Mr. Rizza and Mr. Affidi? A. Yes, I did.

Q. The same letters as Mr. Bulone's Mr. Lucca's and Mr. Farra's? A. Yes, sir. [86]

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Q. Mr. Trama, you recall, don't you, that when you took the crew on for, or when the crew began fishing with you with the Sanyd Boy that you didn't say anything to them about whether or not they would be on just for the sardine season or not?

A. Well, we take it, we don't say it, but you take into consideration when you hire men that you hire for the season.

Q. You didn't say anything to them?

A. No, but I would say it is like a general rule though when you do hire a man, it is for the season.

(Testimony of Mike Trama.)

Q. But you didn't say anything to them?

A. No, there was nothing said. [88]

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Your sardine season in 1957 started September [89] 1st even though you didn't go fishing September 1st, and it ended January 1st, 1958 or December 31st, 1957. Now, during that period you had a crew, is that right, and that crew in addition to yourself consisted of Sal Lucca, Vincenzo Bulone and Antoine Affidi, Fran Garra, Rosario Rizza and Nich Mudry, right?

A. Well, Nich Mudry wasn't on the Fisherman at al,l I man before we—

Q. I am not talking abut the Fisherman now, I am talking about the members of your crew during the 1957 sardine season. A. I see.

Q. Those were men who were members of your crew during the 1957 sardine season? A. Right.

Q. Were any of those men members of the crew when you first began to operate the Fisherman?

A. Yes, some of them were, yes.

Q. Which ones were?

A. Bulone was, and Affidi was part time,and Sal Lucca was part time, and I think Farra was part time.

Q. And those men continued to fish with you most of the time from tht time on until you fired them at the end of 1957 sardine season, isn't that right?

A. Well, I wouldn't say most of the time, some of the time be-[90]cause I think Affidi get off to go to Mexico, as I said before, Bulone went to Alaska, and Farra quit, couple of, he quit and went to another boat, then he was hired, rehired again.

(Testimony of Mike Trama.)

Q. They were never discharged by you before December 31st, 1957, were they? A. No.

A. No.

Q. When they quit and they came back if you had a place, a vacancy on the boat they always got it, didn't they? A. That is correct.

Q. The reason that they always got i, the reason that they stayed with you is because you thought they were good fishermen and you wanted them on your boat, isn't that right? A. Yes, that is right.

Q. Now, some time during the course of the 1957 sardine season you arrived at the conclusion that you were going to fire your entire 1957 sardine crew, did you not?

A. Yes, at the late part of the season I did, yes.

Q. All right. Now, can you fix as closely as possible either in terms of date or in terms of events in terms of things that happened when you made up your mind that you were going to fire your entire 1957 sardine crew?

A. Well, it was nearer December, as close as I can remember, near the end of the season, right about. [91]

Q. Before the beginning of December or after December had begun?

A. It was right in December—

* * * * *

You didn't make up your mind one day, well, I think I will fire Mudry, the other day, I think I will fire Affidi, the other day I think I will fire somebody else, rather you made up your mind at one time that you were going to fire the whole crew, isn't that right?

A. Yes, that is correct.

(Testimony of Mike Trama.)

Q. Now, when was it, if anything, that happened immediately preceding the time that you made up your mind to fire the entire crew that had any connection with your firing of the crew, did anything happen before that?

A. Well, there was certain discussion about these lawsuits all the time on the boat, and they were going to get $20,000, they were going to do this, and they were going to do that. You get tired of hearing those things. I don't think there was a day there was certain discussion where we weren't talking about lawsuits, and so forth. That just made me very irritated and nervous. I don't think I could [92] bear to fish with those men.

Q. In other words, the reason that you fired these men was because they joined together to sue you in Court, is that right, to sue you for damages?

A. That was one reason, Mr. Margolis.

* * * * *

You have told us that one of the things that happened before you made up your mind to fire them was the filing of the lawsuit and the discussion about it. Was there anything else that happened immediately before you fired them that had anything to do with your firing?

A. Well, I could see on the boat there was no harmony, I mean, as far as being a crew member, and me as being an employee, there was no harmony, no feelings that as far as I was concerned that we had to make a living together. I mean,—[93]

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Q. Let me ask you this, just before you fired the men, isn't it a fact that you went to talk to Calise and

(Testimony of Mike Trama.)

other [95] representatives of the Seine & Line Union to see if you could get the boat back in good standing with the Seine & Line Union, is that right?

A. That is after you failed to do something for me I went to see them.

* * * * *

Q. You went to see the Seine & Line Union to see if you couldn't get the boat back in good standing with the Seine & Line Union, isn't that what you did?

A. I went to see anybody concerning these lawsuits.

Q. I don't care who else you went to see, I want to know just this one thing, did you go to see the men from the Seine & Line Union, Calise and the others about the question of getting the boat back in good standing with the Seine & Line Union?

A. Yes, I went to see whether I could get the boat and crew released so we could resume the fishing. I still wanted to keep what I had, and still fish, if I could, with the same intentions.

A. All right. And Mr. Calise and others told you that in order for the crew, in order for the boat to get back in good standing with the Seine & Line Union, the crew [96] had to do certain things, isn't that right.

A. He said that the crew would have to get reinstated. He said,—

Q. And he said they would have to pay a fine, didn't he?

A. Well, I don't know whether he said they have to pay fine or not at the end, I don't recall that.

Q. Don't you recall testifying here a while ago that he said they would have to pay a fine but you didn't remember how much?

(Testimony of Mike Trama.)

A. You said after I fired the crew. I don't remember that, but before that he did, yes.

* * * * *

There was a time when you made up your mind that you were going to fire the crew, not when you fired them, but you made up your mind that you were going to do it. You had to make up your mind before you did it, right? I am talking about things that happened just before you made up your mind that you were going to fire the crew. Now, do you follow me?

A. Yes, I do.

Q. All right. Now, just before you made up your mind that you were going to fire the crew, you had tried to get [97] the vessel back in good standing with the Seine & Line Union, and had been told that the men would have to do these various things if the vessel was to get back in good standing, isn't that right?

* * * * *

A. I went to see Calise with the hope to release the men and myself, that he no longer would have claim on the boat so we could resume fishing.

Q. You were told that the only way you could do that was to get back in good standing with the Seine & Line Union, isn't that right?

A. No, he didn't say that. He says he couldn't do it, he says, under those circumstances that they are now, he says, as long as the crew is going to sue the union we are not going to release you. That is what he told me. Now, does that answer the question, Mr. Margolis.

Q. And he also told you, didn't he, that the men would have to get back in good standing with the Seine & Line Union?

(Testimony of Mike Trama.)

A. As he claimed at the first, he claimed to the end of [98] the season. At the end he claimed, at first that these men be reinstated, he claimed at the end of the season that he still wanted these guys to be reinstated in his union, that is what he told me.

Q. And then you went and you told the men, did you not, that you wanted to get the boat fishing? Didn't you tell the men you wanted to get the boat out fishing?

A. Sure, I was concerned to get the boat fishing.

Q. You told that to the men? A. Yes.

Q. You told them the only way you could get the boat out fishing was if they would do the things that the Seine & Line Union wanted them to do, didn't you say that to them?

A. Yes, that is right.

Q. And they told you that they wouldn't do that, that they wouldn't do the things the Seine & Line Union wanted them to do, isn't that right?

A. That is right.

Q. And then you made up your mind with that as one reason that you were going to fire these men, isn't that a fact?

A. No, that wasn't the reason, Mr. Margolis.

Q. Was it one of the reasons?

A. The reason was that if they wanted to start a lawsuit they were going to keep suing me. [99]

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Trial Examiner: Your answer is yes?

The Witness: Yes.

Q. (By Mr. Margolis): Did you ever tell the men in your 1957 crew at any time prior to the time that

(Testimony of Mike Trama.)

you fired them that maybe if you got rid of them you would be able to work things out a little easier with the Seine & Line Union, and again I am not trying to give exact words, but the substance of that, did you say anything like that to them?

A. I don't remember. I mean, I could or could not, I don't remember.

Q. And the reason you don't remember, Mr. Trama is because one of the reasons you fired these men was because you wanted to make things easier with the Seine & Line Union, isn't that the reason why you don't remember? [104]

A. No, it is not the reason. The reason could be because if I kept them on the boat it would jeopardize my boat, my life. Who knows what is going to happen on the boat when you take a bunch of men and they start suing somebody, or doing something. You don't know what their next step is going to be. I felt that I didn't have no control over these men. They was, you know, there is a lot of things that go into your mind such as those if you don't have control, taking guys out to work, and perhaps the next thing you don't know whether these men are going to take over, and perhaps they are going to run my boat, or run it on the rocks. They can do anything they want.

Q. That is what ran through your mind?

A. Lots of things go through a man's mind. [105]

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Q. (By Mr. Miller): Mr. Trama, I would like to go back to the point after you had made some deliveries of fish to the Franco-Italian Cannery, you stopped fishing because of the light of the moon, is that correct?

(Testimony of Mike Trama.)

A. Yes, that is correct. [107]

Q. After that could you get any orders from them to bring in fish?

A. I think it was later on that we couldn't get no order saying that after we waited four, five days after the full moon period, we still waited then to see whether or not the whole fleet was going to sail or not, then I went back to see whether we had an order for fish, and we didn't.

Q. You don't just go out and catch fish and bring it in and try to sell it?

A. No, sir, you have to have an order to sell these fish.

Q. After your initial deliveries you couldn't obtain an order is that right, from Franco-Italian Packing Company?

A. We had a written order from them, but it seemed like it wasn't any good. Even though I had a written order, and the man said I don't want your fish, or don't go fishing you don't have an order tonight, that doesn't mean that you have to go out and bring it to him and they have to take it, no.

Q. Did you try to sell fish to any other cannery in the harbor?

A. Yes, I tried to several canneries and they all gave me the same answers, to get straightened out with the unions first.

Q. Now, in September of 1957 Mr. Affidi was on the boat, was he not, Antoine Affidi? [108]

A. You mean on the Sandy Boy?

Q. On the Sandy Boy? A. Yes, he was.

(Testimony of Mike Trama.)

Q. In December was Mr. Affidi on the boat?

A. No, he wasn't.

Q. Where was Mr. Affidi, if you know?

A. Well, I have heard that he went back to France for a trip. [109]

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Q. After someone obtained an injunction did you go fishing with the boat Sandy Boy?

A. Yes, we did.

Q. Who was on your crew when you went fishing?

A. Well, there was myself, Vince Bulone, Frank Farrara, Sal Lucca, and I think I hired a new man by the name of Clyde Hill because Mr. Mudry didn't show up.

Q. Did you call Mr. Mudry to come to work?

A. Yes, I did.

Q. Did you have a conversation with him?

A. No, not with him. I called his wife. She told me that he was at work, and I talked to his wife.

Q. Now, do you recall how many days you went fishing after the injunction?

A. I don't know whether the injunction was obtained around the 20th, or something like that. I imagine we must have fished about a week in late '58, yes, '58.

Q. '57? A. '57, I mean.

Q. Now, the men that we talked about were on the boat all during that period of time when you went fishing after [110] the injunction?

A. Yes, they were on, Rizza, by the way, Rizza was on it, too.

Q. Rizza?

(Testimony of Mike Trama.)

A. Yes, Rosario Rizza was on, just slipped my mind.

Q. And they were paid for the fish that you caught?

A. Yes, whatever catch we had in that particular week they were paid for.

Q. Mr. Trama, there has been some question concerning your conversation with John Calise. Did you have one or more conversations with Mr. Calise during the period of October through December 31 of 1957?

A. Yes, I had many conversations with him.

Q. Did you have conversations also with either John Royal or Mel Columbic or the ILWU Union at that time? A. Just about every day. [111]

* * * * *

Q. What I am getting at, at the beginning of the sardine season for 1957 you had confidence in these men as fishermen, and friends, is that correct?

A. That is correct.

Q. At the time that you had decided to discharge them did you still have the same feeling towards them?

A. Yes, I still had the same feeling, we were still friends under the circumstances, I mean.

Q. Did you have confidence in their ability on the boat at that time?

A. I don't know, it is hard to say.

Q. At the time that you decided to discharge them did you have that confidence?

A. No, I was losing confidence in them. I felt that they were run by somebody other than themselves. I had the confidence that somebody was running them, not themselves any more. In other words, what I mean by it, that they are good workers. If somebody tells

(Testimony of Mike Trama.)

you, don't do that otherwise why they start going back.

Q. You feel that they weren't loyal to you?

A. That is correct. [112]

Q. Now, for the purpose of the record, Mr. Trama, how big is the boat Sandy Boy?

A. Well, it registers 44 foot on the keel, and true width if about 16 foot wide.

Q. How big are the living quarters on that boat?

A. Oh, I would say maybe not even a third of this room.

Q. How wide is the cabin?

A. I think it is ten and a half feet wide, or ten feet.

Q. About how long?

A. About 11 foot, 11, 12 feet long.

Q. In that 10 by 11 or 12 feet rectangle you have bunk? A. Yes, there are eight bunks.

Q. Each bunk is about six feet long, isn't it?

A. Yes, the bunk is about six foot.

Q. Four bunks on each side of the cabin, four high?

A. No, there are three on one side, there is three on the starboard side, two on the portside, and there is three, well, there is a partition there, then there is three crosswise.

Q. And also in this area is your kitchen?

A. In this particular 12 feet, yes, there is.

Q. The eating area is also in there, is that correct?

A. Within that 12 feet, yes.

Q. And that is where the crew and you are during the time that you are fishing, if you are not aboard up topside steering the boat, is that right? [113]

A. Well, most of us, yes, we were down below.

(Testimony of Mike Trama.)

Q. In fishing how long are you away from the port, on an average?

A. Well, a couple of days. We have been as long as a week up to intermittent, one night, come back in the morning, go back out. But we do stay out sometimes a week at a time.

Q. At this particular time of the year the sardine season, it is a daily trip, isn't it?

A. That is right, it is. [114]

* * * * *

Q. You hired a crew in 1958 to operate the boat, with a crew in 1958, did you not? A. Yes, I did.

* * * * *

Q. Did you, beginning in 1958, start checking or checking off dues from all of the members of your crew and paying those dues over to the Seine & Line Union?

A. No, I wasn't paying them, no one, to either one union.

Q. You weren't paying anyone. Do you have your settlement sheets here?

A. I think I have. I think they are right there (indicating).

Mr. Miller: Are you talking for the year 1958 when you say settlement sheets?

Mr. Margolis: Yes, 1958.

Mr. Miller: We have them right here.

The Witness: What I meant to say, I withheld all their money, but it was never paid to an individual union, [115] either one of them. I was just holding it until somebody desired what it was to be done.

(Testimony of Mike Trama.)

Q. (By Mr. Margolis): You just withheld their dues? A. Yes.

Q. Did you pay it to anybody? Are you still holding it?

A. No, I paid to somebody now, it is to who the crew wanted it to go to.

Q. Who did the crew want it to go to?

A. They wanted the AF of L to be, they wanted to be paid up with the AF of L.

Q. So you started deducting dues from the crew members wages before you knew whether they wanted any union?

A. No, they said they wanted a union; they said they wanted a union.

Q. But they said they didn't know what union they wanted?

A. They knew, but they didn't say at the time I heard them, no.

Q. When you went to make a deduction the first time you made a deduction for dues right from the very beginning, didn't you?

A. Not from the very beginning, no. I think it was a month or two, I don't know whether it was a month or two, or what it was.

Q. The settlement sheets I have in front of me show no dues deductions for the month of January, 1958, and [116] dues deductions beginning in, wait a minute, let me show you this. Here is a settlement sheet January 2nd, 1958 right? A. Yes.

Q. All right. Now, that is for the month of December, isn't it? In other words, on January 2nd you settled for the month of December?

(Testimony of Mike Trama.)

A. Yes, that was whatever fish was caught during the month of December.

Q. That was with the crew consisting of yourself, Mr. Bulone, Sal Lucca, Rosario Rizza, Mr. Farra and Joe, blank—

The Witness: Joe Parisi, I didn't have his first name.

Q. (By Mr. Margolis): So, in December you didn't collect any checkoff, any union dues, is that right?

A. That is correct, yes.

Q. Now, your first accounting in 1958 was the accounting of February 4, 1958, is that right?

A. Yes.

Q. That was for the month of January, wasn't it?

A. Which one?

Q. February 4, 1958, wasn't that an accounting for the month of January? A. Yes, it was.

Q. And then you had a new crew, Mike Trama, Frank Galonna? [117] A. Yes.

Q. Clyde Hill, Joe Parisi, Vince Pamora and—

A. Joe Jaccalonia.

Q. Joe Jaccalonia. And in February you deducted dues for the month of January, 1958, didn't you?

A. Yes, I did.

Q. So that you deducted dues from the very beginning of 1958 for your 1958 crew, didn't you?

A. Yes, I did.

Q. And you deducted dues for the Seine & Line Union from the very beginning of 1958, didn't you?

A. I did not.

Q. Did you have any conversation with the members of your crew about the dues deductions before you made them? A. Yes, I did.

(Testimony of Mike Trama.)

Q. Who did you talk to?

A. I talked to the whole crew there, the new crew.

Q. What did you say to them, and what did they say to you?

A. They told me, they said to go ahead and make the deductions and hold it in your account, he says, until the squabbles with the union are settled. They said they don't know whether we are going to go with the AF or L or with the ILW due to the fact they were having all these troubles, so they said, you hold our dues, and when we decide which union we want you will pay it to that union. [118]

* * * * *

Q. During 1957 when you came in, Local 33 patroled your boat, didn't they? A. That is correct.

Q. During 1958, Seine & Line patroled your boat, didn't they? A. That is correct.

Q. How did that happen?

A. It is beyond me, Mr. Margolis.

Q. You just don't know anything about it, do you, Mr. Trama? A. No.

Q. Not a thing? A. The only thing—

Q. It just happened?

A. The only thing I can say is both of the two patrols showed up. We have a barge that is set there on the wharf that when you come in the fish, when you call in the barge, when you call in the barge they usually send a patrol. Just happen a few times the boat patrols would come in, and at the later time they must have some kind of discussion among themselves, or that the crew must have wanted the AF of L, or

(Testimony of Mike Trama.)

whatever it was, I don't know. Something happened where the ILWU didn't come around no more, and the AF of L would [120] come instead. [121]

* * * * *

Mr. MacKenzie: I would like to propose a stipulation at this time, Mr. Examiner, that on September 28th, 1957, Mr. Trama sold 76,800 pounds of fish to Franco-Italian Cannery to the value of $3,072.00. On September 30th, 1957 he sold 67,000 pounds of fish to Franco-Italian to the value of $2,680. On October 1, 1957, he sold 25,000 pounds of fish to Franco-Italian to the value of $1,000. And, on October 2, 1957 he sold 84,000 pounds of fish to Franco-Italian to the value of $3,360. That is a sum total of $10,112.

Trial Examiner: Do you so stipulate?

Mr. Miller: Yes, I will so stipulate. [125]

* * * * *

NICHOLAS MUDRY

was called as a witness on behalf of the General Counsel, having been first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. What is your, what kind of work do you do, Mr. Mudry?

A. Machinist and a fisherman, two different occupations.

Q. Were you ever employed by Mr. Trama?

A. Yes, I was.

Q. Will you tell us the circumstances under which you became employed by Mr. Trama?

(Testimony of Nicholas Mudry.)

A. It started way back in the early part of June,

* * * * *

A. His father Santo Trama called me up on the telephone, told me that him and Mike were building a new boat. They wanted to know if I could install the motor, the propellor for them on week ends and come fishing with him. And we did make, I did make an arrangement. He called me up in the latter part of the week. I made an arrangement to see him on Sunday, see the boat, and see what needed to be done. See if [126] I could do it, what the deal was. So I went down and seen him Sunday, and I went down and seen the boat there. He showed me what it was, discussed it quite a bit. And like first over the phone, he did say for me, he'd like me to install it on week ends. I was supposed to be working then. I told him the job was too big, the job was too big, that it couldn't be done week ends, but I would be glad to do it as a full-time job. And Mike and Santo, like, we did discuss terms like he offered me the job over the phone as for week ends, that would be crew on the, fishing on the boat. As long as it couldn't be done on the week ends, we did work my work steady because I needed it to live on. During that period between Mike and him they agreed they would pay me something for working on that at the time, enough to live on at the time, the balance later, plus I would be the engineer on the boat. [127]

* * * * *

Q. Excuse me. What were you to receive in return for this work you were going to do?

A. They was going to pay me the same wages I

(Testimony of Nicholas Mudry.)

always got, only a hundred dollars in account per week for living expenses until we went fishing. And when we went fishing I would be a member of the crew.

Q. Was anything said as to how long you were going to be a member of the crew?

A. Oh, yes, it would be, I would say as long as I wanted, wanted me to be on there indefinitely because he has worked on my boat, he knows how I take care of the equipment. He wanted me to do the same for his boat, said it would be a good engineer between me and him tuna season and all through the time we could make very good money, and I could, I would stay there, you might say indefinitely. [128]

Q. Would you tell us whether or not Mike Trama or Santo Trama told you that you would just be on the boat for the sardine season?

A. No, they never did. They said more about the tuna season the following year, albacore and tuna is where we make the real big money. [129]

* * * * *

Q. Did you ever become a member or permit member of Local 33? [130]

A. Yes, I did.

Q. When was that?

A. I would say about latter part of September, just before I went fishing.

Q. Will you tell us the circumstances of your becoming a member of Local 33? [131]

* * * * *

Trial Examiner: Well, apparently you and Mike Trama went over to Local 33's office on one occasion, and then you came back the next day.

The Witness: Yes, sir.

(Testimony of Nicholas Mudry.)

Trial Examiner: Then tell us what took place on the second day?

The Witness: Well, the second day Mel told both me, [134] Mike and I that we could go fishing if Mike's crew or the crew was represented by their union.

Q. (By Mr. MacKenzie): What did Mr. Trama say, if anything, in this conversation?

A. Well, that is all we had to do now is just, I think Mel did ask Mike who represented who of the crew, if they was represented by us. I think Mike gave him the name, Mike says, as long as we get this crew now to be represented by ILWU will sign the contract, they will let us go fishing with the unions, both unions were demanding we could go fishing as long as we met the price the unions were demanding.

Q. What did Mr. Trama say, if anything to you?

A. Well, it was pointed out by Mel at that time I don't think he had a majority, pointed out by Mel that four,—we did ask Mel if we could belong to his union. He brought out a piece of paper from National Labor Relations Board ballot stating that a man can join any union of his choice, and it is his choice so we decided we could join that union and go through it. And Mike says, that is up to me to go ahead and get the men to join this union we go fishing.

Q. Did you thereafter speak to the men about joining?

A. Yes, we gave the men all the information about going fishing, becoming members of that union, we could go fishing, yes, yes.

Q. Did you tell them that they should join Local 33? [135] A. Yes.

(Testimony of Nicholas Mudry.)

Q. Did Mr. Trama say in your presence say anything to the crew about joining Local 33? A. Yes.

Q. What did he say?

A. Oh, about the same thing, that we could go fishing. In fact, a couple of them don't talk very good English, he did interpret what we had to do, gave them the information that they could go fishing if he had a contract with this local.

Q. Which local is that? A. That is 33.

Q. Is that all that Mr. Trama said?

A. I think there was a conversation for two or three days, so, it must have quite a bit more between me and Mike and the crew and the unions, yes. [136]

* * * * *

Q. (By Mr. MacKenzie): Now, Mr. Mudry, do you recall that after you fished for several days the cannery refused to take the fish?

A. Yes, I did; yes, that is true, yes.

Q. Do you recall any conversations with Mr. Trama after the cannery refused the fish in which the Seine & Line or Cannery Workers was discussed?

A. Yes, that is with Mike Trama. [137]

* * * * *

Q. Where were these conversations?

A. After the cannery had quit taking the fish, it was both at the dock and Mike's home, and at the union offices, just about every day, and any place in that area, in San Pedro.

Q. Do you recall any places in particular?

A. Yes, at the cannery, Mike's home. [138]

* * * * *

(Testimony of Nicholas Mudry.)

Q. (By Mr. MacKenzie): Do you recall any conversations in which Mr. Calise was mentioned?

A. Oh, yes, he says, Mike told me that he was, we was in trouble with Calise, he was.

* * * * *

A. We was getting ready to go fishing again after the full-moon period. Mike called me up and informed me.

Trial Examiner: Called you by phone? [139]

A. By phone, yes. Said that he was in trouble, he couldn't go fishing. The cannery won't take his fish. They informed him that the cannery workers weren't going to work the fish because Calise had declared the boat unfair, that we had to get straightened up with Calise's union; not taking the fish. That they were going to try and go ahead and something to overpass that, bypass that, see, for us to stand by. [140]

* * * * *

Q. (By Mr. MacKenzie): My question was, did you go fishing? A. Yes, we did after that.

Q. You brought in a load of fish? A. Yes.

Q. What happened?

A. There was, the cannery would not, the cannery officials and the man at the hoist would not lower the hoist to unload the fish. We could not unload our fish.

Q. Did anyone from the cannery tell you why they wouldn't unload the fish?

A. They says they didn't want, they couldn't take that fish in there because the Seine & Line Union had declared it unfair, and ordered the cannery workers not to touch it. The cannery workers would walk out of

(Testimony of Nicholas Mudry.)

their cannery if they touched that fish. They couldn't unload it until we straightened up. [141]

* * * * *

Mr. MacKenzie: I will withdraw the question.

Q. Now, Mr. Mudry, do you recall any conversations after the filing of the suit with Mr. Trama regarding the suit? [145]

* * * * *

Q. Do you recall anything more being said?

A. Yes, he says, I asked him why couldn't he join the suit, why couldn't he join the suit, questions that I asked him. Yes. He says, like from, I don't know, this is what he says. He couldn't join the suit join with labor to sue business when he was business man to protect his business and could not join the suit. That he was going, wanted us not to sue, or first he said, we could go ahead and sue, but he wouldn't join us, and his attorney did advise us to save time, advised him that it would be best for us to join Calise's union. This is, Mike was telling me what he said his attorney had told him.

Q. What if anything was said about what Mike Trama would do if the crew didn't sign with Calise? [147]

* * * * *

The Witness: Well, what was said there is that we could go back fishing if we join that union, and he also says that he could get the crew to go back and join the Seine & Line Union, they would listen to him one way or the other. I was arguing with him that maybe they couldn't go from one union to another, the men wouldn't,

(Testimony of Nicholas Mudry.)

but he says that he would take care of the men, that they would do as he says. He was telling me to join, to go join the other union, the rest of the crew would, too. [148]

Q. Mr. Mudry, do you recall any other conversations occurring after the crew sued Mr. Trama, the cannery and Seine & Line in which the Seine & Line or the suit was mentioned? A. Yes.

Q. When were these?

A. Well, there was one occasion I recall it was possibly, oh, week and a half after Mike had told me he wasn't going through with his suit. He did—

Q. Where was it?

A. This was out in the street, just across the street from the ILWU Union office.

Q. Now, who was present?

A. There was Mike Trama, and Vince Bulone, Frank, Sal Lucca, Tony Affidi, and Rosario Rizza, all the crew was there. He had called us all there.

Q. Who called you all there?

A. Mike Trama.

Q. All right. Now, what was said?

A. He says that, couldn't go, his discussion for us to go fishing, by joining back to Calise, dropping the suits, continuation of that. This time he had a piece of paper, he says where it was a letter to our attorney that we wished to inform our attorney that we wanted to drop the [149] suit against John Calise and Seine & Line Union, and that we wanted, that was a letter there, we was asking him how could we join his union, what we had to do. He had this letter.

(Testimony of Nicholas Mudry.)

Q. Excuse me, Mr. Mudry, he was asking us, who was asking what?

A. That is Mike Trama, we was asking Mike Trama what we could do to go fishing. He was telling us what to do, Mike Trama was telling us what to do.

Q. All right. Now, what was said?

A. He had this piece of paper, it was a letter to Mr. Margolis. It was going to be a letter to Mr. Margolis stating that we the undersigned wish to have you drop this suit, words along that extent and meaning, and to drop the suit against Seine & Line, John Calise and Seine & Line, cannery officials.

Q. What else was said, if anything?

A. And for us to go down join Calise's union. And he did say that the crew was going to be fined $300. I wouldn't, I was never a member of that union. But instead of the $300, Calise would take 30 tons of fish that we'd deliver to the fresh fish market, and instead of us getting paid for that fish, we deliver it to the fresh fish market, we turn that fish over to John Calise.

Q. What did the crew say to all this, if anything? [150]

A. The crew was definitely very much opposed to it.

Q. Who, which one?

A. I think it was Vince, Tony, Sal and the other men, they would not go for this, they was—

Q. Proceed. I didn't mean to interrupt you.

A. They was very definitely against turning this fish and joining Calise's union.

Q. Do you recall any other conversations with Mr.

(Testimony of Nicholas Mudry.)

Trama after the suit in which Seine & Line or the suit was mentioned? A. Yes, I do.

Q. When was it?

A. It was again maybe about a week after this where we seen him on the street. He had this piece of paper. We seen him daily. I do recall another point, another day.

Q. Who was present at that time?

A. All the crew was there. We was, we were removing a net off the boat to dry the net out in the field. At that time Mike brought up the subject again, if we wasn't going to join Calise's union that we couldn't go fishing. What else did we want to do. He says, there is nothing that we could do to go fishing only join Calise's union. If we don't join Calise's union we couldn't go fishing. And he says, I could take you any place you want to, we [151] can go up to the judge. We told him to get an attorney. He says, I will take you up to the judge. We says, okay, we will go up to the district attorney, which we did go up to the district attorney in San Pedro and complained to him, complained to him, and he said, we brought up the subject that we had to belong to the Calise's union, what else could we do. I do recall that time there he wanted us to join the union.

Q. Do you recall any other conversations with Mr. Trama about this time where the suit or Seine & Line was mentioned?

A. Yes, it was getting fuel one time at the fuel dock, he was complaining to the attendant at the dock that we won't do what he wants to do, the crew would not let him go fishing because they wouldn't join the Seine & Line union with Calise.

(Testimony of Nicholas Mudry.)

Q. Mr. Mudry, do you recall any conversations with Mr. Trama about Seine & Line and the suit about Armistice Day about of 1957?

A. It was just previous to that time Mike again had us down in the boat.

Q. You do recall a conversation? A. Yes.

Q. When was it?

A. It was the next time was just about, I think it was [152] a Saturday before Armistice Day.

Q. Where was it?

A. This was down at the boat again.

Q. Who was present?

A. All the crew were there.

Q. All of the crew?

A. That is, Vince, Frank Sal, Tony, myself and Rosario, all the crew.

Q. Was Mike there?

A. Mike was there, yes, he called us, he called us down.

Q. Very well. What was said?

A. Well, like he wanted to know what our objections were to joining Calise's union. He says he could —our objections was that we would not trust him. He says, started to say something, now it slipped my mind, like he did start to say what our objections were to joining Calise's union. We told him that we couldn't trust Calise, he demanded this $300 fine, the fish that we had sold, the fish that we had sold. The next thing, we don't know what he would, what he would demand, what more he would demand, so, we couldn't, that was our objections why we wouldn't go to Calise's union.

(Testimony of Nicholas Mudry.)

Well, he says, he has made arrangements to assure us that Calise is honest, that he would allow us to be members in that union, that no harm would come to us, that we could still [153] fish. He had made arrangements for Sam Di Lucca, a fresh fish buyer at San Pedro to act as an intermediary, I believe it was, and the union would bring over some kind of a guarantee that we would not be discriminated against, and we would join the union. He had the union, one of the union officials brought this bunch of papers over to Sam Di Lucca, and we was going to go to Sam Di Lucca's home to make arrangements, guarantee that we would not be discriminated against by the Seine & Line Union.

Q. So, what happened?

A. After dickering around, back and forth waiting most of the day, the men didn't like the idea. I was willing to go up to see what they had to offer. It was getting late. I told Mike that as far as I was concerned I am not interested in joining Calise's union. He was at the Court by his own members, I just had no use for it. And I would not join his union. I didn't want to no matter what Sam Di Lucca had for us, or what it was. I says just it wasn't, didn't make sense to me.

Q. What did Mr. Trama say, if anything, in this conversation?

A. Well, he got very, well, angry about it, got up on the top of the deck, he says, I am talking to you like a father, to the whole crew, they was back. And he says, I am talking to you like a father. I know what is best for you. The only way you will go fishing or ever go fishing [154] you have got to join Calise's un-

(Testimony of Nicholas Mudry.)

ion. If you don't, I am going to tie up the boat and go fishing, and fire you at the end of the year anyway. So I can go fishing with my brother, the season's gone, we will be finished. That was the meaning of that, not exact words. That was the day before Armistice, or two days before Armistice Day.

Q. Did you, did the Sandy Boy go out to sea after that?

A. Yes, this was on a Saturday, and I am quite positive it was a Saturday, might be off a day or two. The day or two after that he called us again and said we were going fishing, got an order from fresh fish market for mackerel. We did go out.

Trial Examiner: I think you have answered the question.

The Witness: We did go out.

Q. (By Mr. MacKenzie): Did you have any discussions with Mr. Trama while you were on that trip concerning the Seine & Line or the suit?

A. Yes, on that trip there he did say as long as you guys won't join the union right now, I don't have the right to fire you. Comes the end, I am going to make it miserable for you from now on till the end of the season, either going to make it so miserable you will quit now. I am going to fire you later on anyhow. That is what he did say. We did go fishing, and even his grocery bill was [155] padded, took stocks out for—

Trial Examiner: Well now, you are telling us what he did or what he said?

The Witness: What he said and did.

Q. (By Mr. MacKenzie): The question was, what was said?

(Testimony of Nicholas Mudry.)

A. He did say he was going to make it miserable. He said he was going to take us out, he was going to make it miserable, take us out fishing so we could fish. If we didn't quit, he was going to fire us at the end of the season anyway.

Q. Do you recall that some time in December the cannery got an injunction? A. Yes, I do.

Q. The cannery got an injunction?

A. Yes, I do.

Q. All right. Do you recall any conversations about that time about Mr. Trama?

A. Yes, he called me up on the phone. He was very much enthused. He was in a good mood, very happy, and he says something good may come out after we will go fishing. He says, the cannery is working on an injunction, if they get the injunction everything will be fine, we maybe can go fishing again. He says for me to stand by. And this might have been on a Friday or Saturday, for me to stand by. He was waiting for word from Joe Mardecich or [156] Andy Mardecich, either one of them to give him the go ahead signal, for me to stand by, that we might go fishing tomorrow night.

Q. What did you say, if anything?

A. I said, well, that is fine, it is very good, glad to hear it. I told Mike though that I just located a job that same day, so I didn't want any more running around back and forth to the boat. If there was fishing, I would be glad to come with him, but if there ain't I will be fishing with him Sunday night, notify me if the injunction went through to be positive that we would go fishing, not off and on like we had

(Testimony of Nicholas Mudry.)

been. Mike said, he asked me to stand by, he will notify me. Then, that is the last I ever heard from him till after I received the letter notifying me that I would, that I had quit, and was no longer employed by him.

Q. (By Mr. MacKenzie): Mr. Mudry, I will show you General Counsel's Exhibit 9(B) and ask you if you recognize that?

A. Yes, I do recognize this.

Q. What is it? A. This is a letter.

Trial Examiner: Well, did he receive it?

The Witness: It is a letter I received in the mail from Mike.

Q. (By Mr. MacKenzie): That is the letter to which you [157] referred?

A. Yes, after Mike had told me to stand by, I was already working, went to work because I didn't hear from him Sunday night. There was no promises going to go fishing, so I went to work. This is the next thing I heard about the fishing.

Q. Now, after the end of the sardine season, do you recall any conversations with Mr. Trama wherein the suit or Seine & Line was mentioned. A. Yes.

Q. Yes. Where was that?

A. I went down to the dock where he kept his boat, and I seen him down there.

Q. When was that?

A. It had been two or three days within that time after I received this letter.

Q. Who else was there?

A. I don't think there was anybody there but Mike, as I recall.

Q. What was said?

(Testimony of Nicholas Mudry.)

A. Well, I asked him about this letter, and, well, he explained to me that the injunction, that they did go fishing. The injunction was only temporary, and that if the injunction didn't go through, and we do not want to become members of the Seine & Line Union, that the boat would be [158] tied up again. He told me he fired the whole crew and me too. [159]

* * * * *

Q. In speaking to Mr. Trama, does he speak English?

Trial Examiner: Which Mr. Trama is this?

Mr. Miller: I am speaking of Santo Trama now, I am sorry. The Witness: He does speak English, but you wouldn't say it is very good, it is a broken English.

Q. And probably his native tongue is Italian?

A. His native tongue is Italian.

Q. You don't understand Italian, do you?

A. No.

Q. Do you speak Italian? A. No.

Q. Do you understand French? A. No. [164]

* * * * *

Q. Well, while you were building this boat they assisted you sometimes, didn't they?

A. Yes, they did, yes.

Q. Was it necessary for you to have an interpreter to tell them what to do?

A. Oh, on some jobs I imagine it would have been necessary.

Q. Well, you couldn't really understand, you couldn't carry on a conversation at that time?

(Testimony of Nicholas Mudry.)

A. Not with all of them, say some of them. I couldn't carry a conversation with some of them, others I could.

Q. Now, on various occasions while they were there at the boat, would Mr. Mike Trama tell them what to do? A. Yes, yes.

Q. When he spoke to them and told them what to do, he would speak to them in Italian, wouldn't he?

A. Most of the time, yes, unless there was an American part of the machinery, he named the American—

Q. He would use the American name for the machinery, but the rest of the conversation—

A. Yes, I imagine it would be.

Q. —was in Italian? [166]

A. I imagine it would be, yes. [167]

* * * * *

You had a conversation concerning the length of time you were to work as a fisherman aboard the boat Sandy Boy, is that correct?

A. There was a length of time might say involved in it.

Q. With whom did you have that conversation?

A. Both Mike and Santo Trama.

Q. Where did it take place? A. At their home.

Q. About when was that?

A. That was the day that we, that I came down when he first hired me.

Q. What did you say, and what did Mr. Santo Trama say, [170] and what did Mr. Mike Trama say, as best you can recall, concerning only your course of employment?

(Testimony of Nicholas Mudry.)

Mr. Margolis: As a fisherman.

Q. (By Mr. Miller): As a fisherman?

A. Well, for me to install this motor and machinery on week ends, and become a crew member on the boat as an engineer; he wanted me to be the engineer on the boat.

Q. I will have to stop you, I am sorry to do that, but I have asked you what did each party say, you are giving us a summary. If you can recall, I would like to know what Mr. Mike Trama said, what his father said, and what you said?

A. Santo Trama say, start off with him, he says, he asked me if I would install the motor and the machinery in this new boat that him and Mike was building and in return I could be a crew member as a fisherman on the boat.

Q. Who said anything about as long as you wanted to be a member of the crew? A. Who said that?

Q. Yes?

A. I believe I says that Santo Trama—

Q. Santo Trama? A. Santo Trama.

Q. That you could be a member just as long as you wanted to be? A. Yes. [171]

* * * * *

Q. As a result of the work and effort that you put in on the boat Sandy Boy or installing the motor and doing this work, you later instituted a lawsuit against Mr. Mike Trama and Santo Trama claiming that you were under paid? [173]

A. That is correct, yes.

Q. In that lawsuit in addition to you there were

(Testimony of Nicholas Mudry.)

Vincent Bulone, Sal Lucca, Tony Affidi and Rosario Rizza, isn't that correct? A. That is correct.

Q. You claimed that there was due to you the sum of $1,589.66?

* * * * *

Q. (By Mr. Miller): As a result of this lawsuit, Mr. Mike Trama and Santo Trama were victorious, you recovered nothing by reason of this lawsuit?

A. Yes, that is correct.

Mr. Miller: Now, for the purpose of the record, Your Honor, I think I should indicate the number of the case. This is the case of Vincent Bulone and others in the Municipal Court of the City of Long Beach, County of Los Angeles, State of California, designated by the number 104 526. [174]

* * * * *

Q. (By Mr. Miller): Mr. Murdy, you went with Mr. Mike Trama to the AF of L Union when he had the contract from Franco-Italian Packing Company to fish, did you not? A. Yes, I did. [177]

* * * * *

Q. You went to Mr. Calise's office with Mr. Trama on one or more occasions?

A. It was definitely one, could be two, possibly more; definitely one.

Q. The one that you recall is when Mr. Trama had the contract and he wanted to go fishing and Mr. Calise walked away from him, is that right?

A. Yes.

* * * * *

(Testimony of Nicholas Mudry.)

Q. It was shortly thereafter that you went to see Mr. Royal? [179]

A. It could even have been the same day, yes, shortly after. I think we seen him before, too, before he went to Mr. Calise, and after.

* * * * *

Q. Well, when you talked to Mr. Royal or Mr. Columbic at one time or another, was there a conversation to the essence that if you had a written contract they would consider whether or not the Local 33 could let you go fishing?

A. What contract are you talking about, this written contract?

Q. I am talking about the contract of Mr. Trama and Mr. Mardecich setting the prices of fish, was there such a conversation with Mr. Royal or Mr. Columbic that if you had a written offer that they would consider it? A. Yes, yes. [180]

Q. And it was the basis of that conversation that Mr. Trama went to Joe Mardecich and obtained this contract?

A. I would say that was it, yes.

* * * * *

Q. (By Mr. Miller): We can say that after you had talked to Mr. Calise trying to exhibit to him this contract, you then went to Mr. Royal or Mr. Columbic?

A. That is correct.

Q. Was it Mr. Royal or Mr. Columbic, or both of them that you talked to? A. Both of them.

Q. They told you that if they represented the majority of the crew they would sign a contract and per-

(Testimony of Nicholas Mudry.)

mit you to go fishing upon the terms expressed in the contract with Mr. Mardecich, is that right?

A. The words to that effect, the same meaning, that we could, about the words to the same effect. [181]

* * * * *

Q. Well, just think back, wasn't it before you left the office when you were talking to him about this contract, and there was a conversation that you could go fishing if they represented a majority of the crew, before you left the office you made application to join that union, didn't you? A. That is correct.

* * * * *

Q. How soon after that did you talk to the crew about what union they were a member of?

A. I would say almost immediately, to give them the story, you know, immediately, that was my next concern.

Q. That is right, you went down and you talked to the crew, didn't you? A. Yes. [182]

* * * * *

Q. Well, at that time did these men go with you back to the ILWU Union?

A. Oh, it is hard to say, hard to say whether they went right after that; it is hard to say, don't recall.

Q. Did you take any of them back with you?

A. At different times, I did.

Q. They went with you? A. Yes.

Q. Anyone other than yourself go with them, to your knowledge?

A. Oh, it could have been, yes.

(Testimony of Nicholas Mudry.)

Q. Was Mr. Mike Trama with them at any time that they went to the union?

A. I would say he was, yes, at times.

Q. Were all of them?

A. All of them, maybe one of them, two of them at different times when we was there maybe ten times together in and out, 15 times. [184]

Q. What did he do, drive the car?

A. No, I think he done more than drive the car. [185]

* * * * *

Q. You went fishing the first time on September 27, didn't you? A. I believe that is the date.

Q. That is the same day that the contract was signed. A. I don't recall if it was the same day.

Q. Now, you fished four or five days and caught fish, is that correct? A. That is correct. [189]

Q. And delivered all the fish to the Franco-Italian Packing Company on Terminal Island?

A. That is correct.

Q. The first day that you delivered fish there were some men walking up and down the dock claiming to be pickets for the AF of L, weren't there?

A. Yes.

Q. That fish was delivered, and the fish that you caught in the subsequent four days was delivered to the cannery. A. That is right.

Q. Now, the next time you delivered, attempted to deliver fish to that cannery there weren't any pickets there, were there? A. No, there wasn't.

(Testimony of Nicholas Mudry.)

Q. But the cannery workers wouldn't unload the fish? A. Somebody wouldn't unload it.

Q. The fish stayed on the boat?

A. That is correct.

Q. And the fish stayed on the boat until the time that the fish and game came to the boat, didn't they?

A. That is correct.

Q. They were going to do something?

A. I don't know.

Q. Subsequently, very shortly thereafter the fish was delivered to the fish market in San Pedro, wasn't it?

A. That is right. [190]

* * * * *

Mr. MacKenzie: I know nothing of the conversations.

Trial Examiner: We will note the stipulation.

Q. (By Mr. Miller): Now, at the time that the lawsuit was filed, Mr. Mudry, did you know who was going to be defendants in that lawsuit? A. Yes.

Q. You knew that Mr. Trama was going to be a defendant? A. Yes.

Q. Did you so advise him? A. I think he knew it too.

Trial Examiner: The question is, did you tell him?

The Witness: No, I did not advise him.

Q. (By Mr. Miller): Now, this lawsuit was filed, Mr. Mudry, I believe, on the 20th day of October of 1957; it is [194] 28th, I am sorry, the 28th day of October. Now, you say that about a week after the lawsuit was filed that you had a conversation with Mr.

(Testimony of Nicholas Mudry.)

Trama across the street from the Union office?

A. That is right.

Q. You are not quite sure of that time, are you, that it was a week later, it could have been longer than a week?

A. It could have been a little bit longer. It could be a little bit shorter. It was after the suit was filed. [195]

* * * * *

Q. Across the street from the Union Hall about a week after the lawsuit involved against the Union had been filed, he had a conversation with these men telling them what the Union—strike that, instead of saying Union, what the Seine & Line demanded to permit the boat to go fishing, is that right? A. That is right.

Q. In effect he said to them, I have talked to Mr. Calise, probably he said I have talked to John, didn't he? A. Yes.

Q. And John said if we do this and this and this, he will permit us to go fishing, isn't that right?

A. It would be about that line, yes.

Q. And then there was a general conversation with all the men as to whether or not they wanted to do that, meet those demands of the Seine & Line Fishermen's Union? A. There would be that, yes.

Q. And as a result of that conversation the result was that the men said, we won't do that?

A. That is right. [197]

* * * * *

Q. At that time when you were removing the net, Mr. Trama [198] told you that he didn't think that

(Testimony of Nicholas Mudry.)

this lawsuit that you had filed, that had been filed would get the boat to go fishing?

A. I don't recall if he said that the lawsuit would get the boat to go fishing.

Q. Well, he said that it would not get the boat to go fishing, didn't he?

A. He said there was a—there was nothing good, at different times he did say we would get nothing out of the lawsuit, for us to, there was other conversations for us to join Calise's Union; he told us what to do.

Q. Didn't he say to you, I will take you anywhere you want to go and they will tell you that there is nothing that we can do?

A. No, he didn't say that they will tell us that there is nothing that we can do, he say—he said, I will take you any place you want to go, but he didn't say that they will tell us that there is nothing that we can do.

Q. Did he tell you that he had gone to consult with persons in the National Labor Relations Board?

A. Not at that time he didn't tell me that, no, but I think he did though, consult the National Labor Relations Board. [199]

* * * * *

A. I said this would be a Saturday, the day before Armistice day, I am quite positive it is Armistice Day, the Saturday before Armistice Day I am talking about, this Saturday which could be the 9th, Mike called us down to the boat, and previous to that we had told him that we couldn't go back to Calise's Union as he wanted us to because we couldn't trust him. So he had made arrangements with John Calise that would prove that we would not be discriminated against by John

(Testimony of Nicholas Mudry.)

Calise's Union. That we could go back and join his Union. That was this Saturday morning. We was [202] there.

Q. That is when you said that Mike Trama said he had made arrangements with an intermediary to work with Mr. Calise? A. That is right.

Q. To keep him honest?

A. That is correct, it could be about that.

Q. Yes. And you and the members of the crew still did not think that you should do that because you didn't trust Mr. Calise, is that right?

A. I think at that time, I imagine I didn't trust Mr. Calise. I myself personally didn't want nothing to do with the man. I didn't want to join his Union. I wasn't interested.

* * * * *

Q. Was it at this time that Mike told the crew members that he was acting like their father?

A. Yes.

Q. Was that on the boat?

A. That was on the boat, yes.

Q. Mike was excited then, wasn't he, he said—

[203]

A. He was, yes, he was excited.

Q. Did he jump up on the boat to speak to the men?

A. Well, to the essence of that, yes. I think he was up on the topside bridge there.

Q. Was he speaking to you or the crew members at that time?

A. To all the crew members. It was a conversa-

(Testimony of Nicholas Mudry.)

tion for about an hour, both in the galley and on the deck and on the roof.

Q. Tell me, Mr. Mudry, when Mr. Trama speaks to the crew, or spoke to the crew on this particular occasion, did he speak in English or in Italian?

A. Both, both English and Italian.

Q. You could understand the English, but you couldn't understand the Italian?

A. That is right, I wouldn't understand Italian.

Q. When he spoke in English, that is what you have related to us? A. That is correct.

Q. Did he say in English, if you don't do what I tell you, I will fire you?

A. He says in English definitely, that he was speaking, he knew what was best for us, that we had to join that Union. He was talking to us like a father. And he would fire us definitely. That is what I asked him for my back pay. [204]

Q. Mr. Mudry, at this time—just a moment. At this time I am interested in what he said to the crew in English. [205]

A. In English?

Q. That you understood?

A. I am part of the crew, and he was talking to me in English. He says, I am talking to you like a father. I know what is best for you, and how we are going to go fishing. There was quite a few thinks with it, if we don't do that, that at the end of the year he was going to fire us.

Q. When you say that, is that what he said to you?

A. That is what he talked to the crew and me.

(Testimony of Nicholas Mudry.)

Q. And that was in English?

A. That was in English.

Q. Did he tell you to tell that to the crew?

A. No.

* * * * *

Q. (By Mr. Miller): Mr. Mudry, after this conversation when Mike said he was going to talk to you like a father, you received a call to go out and go fishing again?

A. Yes, we did go fishing that Sunday night. [206]

* * * * *

Q. It was during this trip that there was a conversation about getting squared away with the AFL-CIO Union?

A. There was on this trip, yes.

Q. Was it just once during the evening, or was it continuous conversation during the evening?

A. It wasn't continuous, just two or three times, that is about the most during the whole trip, not the evening. The trip includes that evening, night and morning; the following day during the trip, yes.

Q. About a period of eight or ten hours? [208]

A. It was more than that.

Q. Where would the conversations take place?

A. On the boat. I imagine it would be in the galley.

Q. While the boat was under way A. Yes.

Q. So that at best, one man of the crew wouldn't have been present during this conversation?

A. Definitely, one man would be at the wheel if it was under way.

(Testimony of Nicholas Mudry.)

Q. Yes. What, if anything, did Mike tell you concerning the AFL-CIO Union?

A. Oh, at one time during the trip or after we had come in he said he wasn't interested in catching fish, just wants to make it miserable for us to quit fishing because we wouldn't join the AF of L Union. [209]

* * * * *

Q. As a matter of fact, Mr. Mudry, when you left the boat that day, you didn't intend to come back did you?

A. Oh, definitely I did, yes. Any time Mike would call me I would come back

Q. You obtained employment some place else, didn't you?

A. Yes. Not immediately after, between then and now, yes; I did, yes. I did get employment.

Q. Do you recall when you went to work?

A. Yes.

Q. For somebody other than Mr. Trama?

A. Yes.

Q. When was that?

A. I am quite sure it was December 16th.

Q. December 16th? A. December 16th.

Q. In what capacity did you go to work?

A. I went back as a machinist.

Q. For whom?

A. It was an aircraft company here in town. [211]

Q. What is the name of the company?

A. I would not like to say.

Q. Are you still with the same company?

A. I am.

(Testimony of Nicholas Mudry.)

Q. When you took this job, Mr. Mudry, was it on an hourly basis? A. Yes.

Q. Do you know of anything that Mr. Trama did on that boat to make it miserable for anyone?

A. What he did do?

Q. Yes? A. From what he generally does do?

Q. Yes?

A. Yes. I might say, make it miserable from his general procedure, that he would go out on a night like this. First of all we did pass school after school of fish going down south. He put on enough groceries for maybe four or five days, six days of groceries. Said he wasn't going to come back to port, plus he padded the grocery bill. Actually the bill was only $25 of groceries, he had a bill that was $50. We asked him about that. He admitted it wasn't correct, said he would take care of it. That was the first time he took groceries of that type in all the seasons. He didn't take that kind of groceries. He told us—or tried to give us the impression that he was going to San Diego and fish down there. [212]

Q. This all occurred after he told you that he was going to make it miserable for you? A. Yes.

Q. You didn't go fishing with him after that time, did you?

A. Oh, yes, after he told us he would make it miserable, yes, this is the time we went. He told us the day before he was going to make it miserable so we would quit.

Q. Mr. Mudry, it is my understanding that the last time you were on the boat when you caught fish, that is when he told you that from then on he was going to make it miserable for you?

(Testimony of Nicholas Mudry.)

A. No, I don't think that would be correct. That I said?

Q. That is what you just told me.

Mr. Margolis: Object on the ground it is argumentative.

Trial Examiner: Sustained.

Q. (By Mr. Miller): Now, Mr. Mudry, on your employment on the boat, did you have the right to quit at any time? A. Yes.

Mr. Margolis: Just a moment. Object on the ground that calls for the legal conclusion and opinion of the witness.

Trial Examiner: It does. I suppose all we are interested in is his frame of mind in that respect.

Mr. Miller: Then I will—

Trial Examiner: I will sustain the objection.

Q. (By Mr. Miller): Do you think you had the right to quit [213] at any time?

Mr. Margolis: Object on the ground it is immaterial.

Trial Examiner: I will overrule the objection. You may answer.

The Witness: Yes, I can quit any time, it is a free country, I am not a slave. [214]

* * * * *

Q. (By Mr. MacKenzie): Mr. Mudry, do you recall when it was that you and the crew sued Mr. Trama for moneys you felt you had earned building the Sandy Boy? A. When did we sue?

Q. Yes.

A. I myself personally?

(Testimony of Nicholas Mudry.)

Mr. Margolis: Maybe we could stipulate as to the date, that would be more accurate.

Mr. Miller: April 1, 1958 is the date on the summons that I have.

Mr. MacKenzie: That is what I am interested in.

Mr. Margolis: Yes, that is correct, the correct date.

Trial Examiner: You are all satisfied. Well, let the record show that. [215]

* * * * *

ANTONE AFFIDI

was called as a witness on behalf of the General Counsel, having been first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. Were you ever employed by Mr. Mike Trama on his boat the Fisherman? A. Yes.

Q. Do you recall about when you went to work on the Fisherman?

A. Yes, some time in June '57, 1957.

Q. While you were on,—

When did you first go to work for Mr. Trama on the Fisherman? Did you work for Mr. Trama on the Fisherman another time before 1957?

A. I don't remember. I guess I was. I don't remember whether I was with him.

Q. All right. Now, when did you first work on the Fisherman? A. Some time in June '57. [216]

Q. Now, while you were on the Fisherman were you a member of any union? A. Yes.

Q. What union?

(Testimony of Antoine Affidi.)

A. AF of L, Seine & Line, I mean.

Q. Now, did you work on the Sandy Boy?

A. Yes.

Q. Mr. Affidi, how long did you work on the Sandy Boy? A. Oh, for three months.

Q. This was before it went fishing? A. Yes.

Q. How much did you work on the Sandy Boy, how much, how many days?

A. Oh, how many days? Two, three days a week, four days a week.

Q. This was before it went fishing? A. Yes.

Q. Do you recall about how many hours a day you worked? A. Four or five hours a day.

Q. What did you do on the Sandy Boy before it went fishing?

A. Oh, I went to the boat, I cut the line with the hammer, I gave up with the ladder.

Q. The ladder to what? A. To the boom.

Q. What else? [217]

A. I painted the fishing hold. I help Nick for that tank, the tank fuel, fuel tank, I mean.

Q. Anything else?

A. Oh, you see, he has got some needle, it has got a hole and the needle has got a little hole, he puts some plugs on top of the needles. I do a lot of work. I help a lot of times, lot of things.

Q. Do you recall doing anything else in particular?

A. Cut the line, all the time the boat got a line with a hammer, he cut the boat.

Q. Now, why did you do all this work, Mr. Affidi?

* * * * *

(Testimony of Antoine Affidi.)

Why did you do the work?

The Witness: Because he promised me a job on the Sandy Boy.

Q. (By Mr. MacKenzie): Who is he?

A. Mike Trama.

Q. Will you tell us whether or not Mike said how long you would be? [218]

* * * * *

Q. Mr. Affidi, what if anything did Mr. Trama say about how long you would be on the boat?

A. No.

Q. By no do you mean he didn't say anything, or what?

A. He didn't say anything for as long as I stay on the boat, you can stay ten years if you want on the boat, be top man, you can stay all your life.

Q. Did he say that? A. No.

Q. He didn't say anything? A. Anything.

Q. Do you recall, Mr. Affidi, when the Sandy Boy first fished? A. Yes.

Q. Now, before or after the Sandy Boy fished, did Mr. Trama say anything to you about Local 33?

A. No, after fishing two, three days he told me you have got to join the other union.

Q. What union? A. Local 33. [219]

Q. Where did he tell you that?

A. After two, three days of fishing.

Q. Where?

A. Oh, in front of the union, he told me this in a coffee shop. He told me one time my house, too, and on the boat.

(Testimony of Antoine Affidi.)

Q. Did you fish with the Sandy Boy the first day?

A. No, I don't fish on the Sandy Boy the first day because he has got too many picket line, I am afraid to go fishing the first day.

Q. When did you first fish?

A. Second day I go fishing with him.

Q. Mr. Affidi, do you remember that the crew sued Mr. Trama and the cannery?

A. Yes, I remember.

Q. Now, after the crew sued Mr. Trama and the cannery, did Mr. Trama say anything to you about Seine & Line Union, or the suit?

A. Yes, he said—

Q. Just yes or no? A. Yes.

Q. Where did he say this to you?

A. In the front of the union.

Q. What union? A. Local 33.

Q. Anywhere else? [220]

A. Yes, he says in coffee shop and the boat most of the time, and my house.

Q. You had several conversations? A. Yes.

Q. Do you recall any particular conversation?

A. Yes, in the coffee shop across the street.

Q. Who was there?

A. All the crew, me, Nick, Farra, Bulone, Sal Lucca.

Q. Now, what did Mr. Trama say?

A. He says, you want to go fishing you got to change union, go the Seine & Line pay $300 and some fish. [221]

* * * * *

(Testimony of Antoine Affidi.)

A. Oh, he said drop, lot of time, drop the suit; lots of times.

Q. Now, did you leave the United States during fall— A. Yes.

Q. —of 1957?

A. Yes, I leave the United States the 3rd of December.

Q. Where did you go? A. Algiers.

Trial Examiner: In France?

The Witness: Yes, in France.

Trial Examiner: Yes. [222]

Q. (By Mr. MacKenzie): Why did you go, Mr. Affidi?

Mr. Miller: Your Honor, I am going to object to that, certainly it would be immaterial here why he went.

Trial Examiner: I will overrule the objection. You may answer.

The Witness: Yes. I go Algiers because I know that—you see, I no got any more job. I go marry my daughter.

Trial Examiner: What is the last part of that answer?

(Record read.)

Trial Examiner: I guess we can understand that to mean his daughter's wedding. [223]

* * * * *

Q. All right. Now, when did these—when did this talk that you had with Mr. Trama in which he said that if you don't join the Union, the Seine & Line Union or pay the $300 fine, and give them some fish you

(Testimony of Antoine Affidi.)

would be fired, you can pick up your clothes?

A. Yes. When?

Q. When was that?

A. After one week of fishing with the Sandy Boy.

Q. Well, was it before you went to French Algiers?

A. Oh, yes, before. [224]

Q. About how long before?

A. Long, I go Algiers three December, this will be supposed to be in October, something like that. I don't remember exactly.

Q. Was it your understanding that you were fired? Did you think you were fired?

A. Fired? What do you mean?

Q. That you no longer had a job?

A. Yes, that is right. [225]

* * * * *

Q. You remember we were in court in Long Beach?

A. Yes.

Q. You claimed in that lawsuit that Mr. Trama owed you money, didn't you? A. Yes.

Q. In fact, you claimed that he owed you the sum of $1,820? A. What do you say?

Mr. Margolis: I will stipulate to that.

The Witness: Give me one thousand?

Mr. Margolis: We can save some time if you want to read in for each of the men here the amount of the prayer, I will stipulate that that was the prayer in the Complaint.

Mr. Miller: Yes. For Mr. Bulone, Mr. Luca and Mr. Affidi it was $1,820. For Mr. Rizza, $2,474, and I have already read the amount for Mr. Mudry which is $1,589.66.

(Testimony of Antoine Affidi.)

Trial Examiner: All right.

Mr. Margolis: I so stipulate.

Trial Examiner: Very well.

Mr. Miller: I imagine we can further stipulate that on December 8th Judgment was rendered in favor of the defendants.

Mr. Margolis: Without stipulating as to its materiality, I don't think it is material here. I agree that that is the fact. [230]

Trial Examiner: All right.

Q. (By Mr. Miller): Now, Mr. Affidi, after you had fished for three or four days—

A. Yes.

Q. —you say that Mr. Mike Trama told you that you would have to join the AFL Union? A. Yes.

Q. As a matter of fact—

Mr. Margolis: I think you misspoke yourself.

Q. (By Mr. Miller): Local 33, he told you you would have to join Local 33? A. Yes.

Q. Now, Mr. Affidi, at that time didn't he tell you that he had a contract with Local 33?

A. I don't know, no see the contract. He told me to join other Union, that is all.

Q. He said that you would have to be—you would have to join that Union to be a member of the crew, didn't he? A. Yes, that is right.

Q. Prior to that he never told you where to go, what Union to join, did he, before that conversation?

A. Yes, yes.

Q. He never had any conversation with you telling you that you had to join the Union, did he?

A. Yes. [231]

(Testimony of Antoine Affidi.)

Q. Now, at a later time in the coffee shop there was a conversation about the other Union, which is John Calise's Union, is that right? A. That is right. [232]

* * * * *

Q. Yes. Now, this conversation about your joining the other Union, going back to your first Union, John Calise's Union, did that occur after those two trips to the fish market? A. Yes, I guess; yes. [233]

* * * * *

Q. You are sure, Mr. Affidi, that when Mr. Trama was talking to you and wanted you to join John Calise's Union that he [234] mentioned the lawsuit?

A. Yes. He told me, drop the suit, pay $300. He wants the fish, too.

Q. Mr. Affidi, didn't he tell you that was what John Calise told him, and he was telling you what Calise had told him?

A. I don't know. Mike Trama told me, I don't know Calise or not, I don't know.

Q. And was it then that you went on the boat and picked up your clothes and left?

A. After this?

Q. Yes? [235]

* * * * *

Q. Did you talk to any of the crew men, Mr. Bulone or Mr. Luca, Mr. Rizza, Mr. Ferrara?

A. Yes, I talked to them.

Q. Did they all think they were fired, too?

A. Yes, he told all the crew.

(Testimony of Antoine Affidi.)

Q. Well, did they all agree with you that they didn't have a job any more?

A. Have no job any more?

Q. Did they say that?

A. He say that. [236]

* * * * *

Q. Aren't there two seasons?

A. Two seasons.

Q. Yes, what are the seasons of fishing?

A. He has got sardine season for sardine, and season for tuna.

Q. And the sardine season is what, from September 1 to the end of the year?

A. The end of the year, yes.

Q. When you are hired, Mr. Affidi, you are hired for a season, aren't you?

A. I no hired for season. [238]

Q. You take your clothes and leave the boat when you want, in your opinion? A. Oh, yes. [239]

* * * * *

VINCENT BULONE,

a witness called on behalf of the General Counsel, after having been duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. When did you start?

A. Started in 1955.

Q. For how long?

(Testimony of Vinceno Bulone.)

A. Oh, how long—more than five year.

Q. When did you last work for Mr. Trama on the [246] Fisherman?

A. When he go fishing on the Sandy Boy.

Q. Did you belong to a union when you worked on the Fisherman? A. Yes.

Q. What union? A. AF of L.

Q. Did you work on the Sandy Boy before it was launched? A. Yes.

Q. What did you do?

A. Oh, pin the boat, put up masts, put ladder.

Q. The ladder to where?

A. The mast up on top of the mast, clean the boat.

Q. I didn't hear that.

A. I say clean the boat. Pin the boat, put concrete in the boat.

Q. That is ballast?

A. Yes, in the hatch, pin the hatch, put table on the hatch, pin ballast, clean up the pilot house. I operate the winch in the boat.

Q. You put the winch in the boat?

A. I helped. The gear, the gear, you know pull the nets, help with the gear.

Q. How long did you work on the Sandy Boy before it was launched?

A. Oh, three, four months.

Q. How often? [247]

A. Would you repeat that again?

Q. How many days, how many weeks?

A. Oh, I think three, four-day week, three, four-day week.

(Testimony of Vinceno Bulone.)

Q. How many hours a day?

A. Oh, five, six, seven hours. It depend.

Q. Did anyone else work with you on the Sandy Boy before it was launched? A. Yes.

Q. Who?

A. Toni Affidi, Rosario Rizza, Nick Mudry, Sal Lucca and myself and Frank Ferrara.

Q. Were you paid for working on the boat?

A. No.

Q. Before it was launched?

A. No, pay no.

Q. Why did you work on the boat.

A. Because promised a job.

Q. Who promised? A. Mike Trama.

Trial Examiner: Doing what and where?

Q. (By Mr. MacKenzie): What kind of a job did he promise you? A. Fishing fish. [248]

* * * * *

Q. (By Mr. MacKenzie): Did Mr. Trama say anything about how long you would work fishing on the Sandy Boy?

A. No told to me you can stay and use the boat.

Q. What was that?

A. Use it longer you want on the boat, maybe one hundred.

Q. Did he say anything about staying with him for years?

A. No, no. I am good a fisherman, good worker, so long, as I stay on the boat. Nobody chase me. I say nobody told me to get out of the boat, you know. [249]

* * * * *

(Testimony of Vinceno Bulone.)

Q. (By Mr. MacKenzie): Mr. Bulone, after you received that letter, did you talk with Mr. Trama about the Seine & Line Union? A. Yes.

Q. Where did you talk?

A. I talk, I come and see the boat after three, four days. I got a letter home. I say Mr. Mike I want my job back. I said to me I no give job back to me, no more. I say why. I say to me why. I say because the union you come in the boat, the union say you come on the boat to give trouble, the Seine & Line, no. I say all right. I want to go fishing. I say the union give you trouble I take my clothes myself, I go. I say you go because I don't want to give you job no back no more. [254]

* * * * *

Q. Do you remember when the boat Sandy Boy first went fishing? A. Yes.

Q. Did you join the CIO Union—not the CIO, I'm sorry.

The John Royal Union, do you know Mr. Royal?

A. Yes. I know Mr. Royal.

Q. That is Local 33? A. Yes.

Q. You joined that union, didn't you?

A. Yes. I joined. I put application in.

Q. An application?

A. Yes, to give me the book because that's a good union, yes. [260]

* * * * *

Q. When you went to work on the boat Sandy Boy, there was never any mention how long you were going to work? A. No.

* * * * *

(Testimony of Vinceno Bulone.)

Q. Would you ask him how long am I going to stay on the boat? A. No.

Q. And he would just say to you, Vince, you can stay with me as long as you want? A. Yes.

Q. But you could leave any time you wanted to leave? A. Yes. [262]

* * * * *

Q. Where was he then when you talked to him three or four days later?

A. On the boat. I going to talk to Mr. Trama.

Q. Yes.

A. Got new crew on the boat.

Q. You went down to the boat? A. Yes.

Q. Three or four days after you picked up your clothes? A. Yes.

Q. And Mr. Trama was there with some other men?

A. Yes, the new crew.

Q. And that is when you had this conversation with him? A. Yes.

Q. And you said to him, I want my job back, didn't you? A. Yes.

Q. And Mr. Trama said no, you can't have it?

A. Yes.

Q. Was it then that he told you that if you were on the boat that the Seine & Line Union would make trouble for you?

A. If I go on the boat myself and make trouble, if I go on the boat, Mr. Trama said if I go on the boat.

Q. He said first if you are on the boat the Seine & Line will make trouble for me? [265]

A. Yes.

(Testimony of Vinceno Bulone.)

Q. And you told him if they make trouble for you, I will get off the boat? A. Yes.

Q. Is that right? A. Yes. [266]

* * * * *

Q. (By Mr. Miller): Mr. Bulone, when you just testified that Mike told you all these things about why he wouldn't hire you back, is that what he said to you when you came back on the boat to ask for your job back? A. Repeat that again.

Q. When you came back to Mike on the boat and said that you want your job back— A. Yes.

Q. Did he tell you that he didn't want you because you hadn't stopped the lawsuit and you hadn't paid money to the Sein & Line Fishermen's Union?

A. Yes.

Q. Is that what he said to you at that time?

A. Yes. [269]

* * * * *

Mr. MacKenzie: Mr. Examiner, at this time I would like to propose a stipulation, that if Mr. Earl W. De Harg were called to testify he would testify under oath that he is office manager and comptroller of Franco-Italian Packing Company, and that he is in charge of the books and records of Franco-Italian and based on an examination of said books and records and to his personal knowledge, Franco-Italian during the period from September 27, 1957 to January 1, 1958 bought fish from Mr. Mike Trama, a total value of $11,723.50.

During the period from January 1, 1958 to Septem-

(Testimony of Vinceno Bulone.)

ber 27, 1958, Franco-Italian bought fish from Mike Trama to the total of $35,155.82, and that in the period from September 27, 1958 to December 31, 1958 Franco-Italian bought fish from Mr. Mike Trama to the value of $43,362.50.

Mr. Margolis: This is fish from the Sandy Boy?

Mr. MacKenzie: Yes, this is fish caught on the boat Sandy Boy.

Trial Examiner: Do you so stipulate, Mr. Miller?

Mr. Miller: Your Honor, I don't believe that is a complete [270] stipulation. The stipulation is that subject to my right to object to such testimony, I would make that stipulation, but I reserve the right to object to the admission of that testimony.

Mr. MacKenzie: I don't think it is necessary to put that into the stipulation, but if you wish, you are free to do so.

Mr. Miller: I think it is very necessary to do so.

Trial Examiner: Now, you agree to it. You accept the stipulation as fact, but object to its consideration?

Mr. Miller: That is right, sir. If he were here I would object to his testimony.

Trial Examiner: All right. I think that that is clear enough.

Now, you asked that the subject of the stipulation be considered in connection with the assertion of jurisdiction by the Board.

Mr. MacKenzie: That is right.

Trial Examiner: You object.

(Testimony of Vinceno Bulone.)

Mr. Miller: Yes, sir.

Trial Examiner: On what basis?

Mr. Miller: I object to the admission of any testimony of what the boat did in 1958 as not encompassed within the pleadings as to the alleged unfair labor practices in 1957.

Trial Examiner: Do you further object to any [271] consideration of the 1957 operations of the boat or sales from the boat?

Mr. Miller: No. I think that is within the period.

Trial Examiner: All right.

Mr. Miller: And I wouldn't object to that.

Trial Examiner: All right. I will overrule the objection as for the consideration of the 1958 sales, and the stipulation is received.

* * * * *

Mr. Miller: In that case I will still renew the motion that I made at the beginning of this, that inasmuch as the General Counsel has not shown jurisdiction, that this vessel was engaged in commerce in 1957 and even using the $50,000 figure, using a projected period from September 27, '57 to September 27, '58, the earnings of the boat were [272] still less than $50,000. I feel that there is no jurisdiction in this Court to proceed with this hearing. [273]

Trial Examiner: Well, I think that there is jurisdiction. I will overrule or I will deny the motion to dismiss on that basis. [274]

* * * * *

MIKE TRAMA

called as a witness by and on behalf of Respondent, having been previously duly sworn, testified further as follows:

Q. Now, Mr. Trama, how old are you?

A. I am 25.

Q. How long have you been in this country?

A. I have been here for about 10 years.

Q. And you were born in Italy, were you not?

A. Yes, I was.

Q. Did you go to school in this country?

A. About three years.

Q. What grades were they, what school? High School?

A. San Pedro Junior High. [285]

Q. How far did you go in high school?

A. Ninth grade.

Q. After ninth grade did you go to work as a fisherman?

A. Yes, I did.

Q. How old were you then?

A. Sixteen.

Q. And you went to work for who?

A. I went to work for my father.

Q. Did he own a boat at that time?

A. No, he didn't.

Q. He was working for someone else?

A. Well, he would charter a boat from somebody else and put his net on it, and he was like running it, like a skipper, I guess.

Q. Were you a member of any Union?

(Testimony of Mike Trama.)

A. Yes, I was. I became a member later on, yes.

Q. Of what Union?

A. Well, I think I was a member of the ILWU. [286]

* * * * *

Q. Did you own any interest in the boat Fisherman?

A. Not at first, no, but I became a partner, I imagine it was 1956 or '57 on the Fisherman.

* * * * *

Q. How many men were aboard that vessel fishing?

A. There was five of us.

Q. Who were those five?

A. Over what period? [287]

Q. Let's say in June of 1957?

A. June of '57?

Q. Yes.

A. There was me, this Bulone. I can't remember too much about it. I mean there was so much switching going on where guys would come in for a month or two and somebody else would replace them, and then take off again, and you had to rehire a new crew all around.

Q. You have been acquainted with Mr. Sal Lucca for some time, haven't you?

A. Well, it's been over two years, I think.

Q. And Mr. Ferrara?

A. Mr. Ferrara has been—well, I have known him for a long time. I mean,—

Q. You have known Mr. Ferrara since he came, arrived in this country, have you not?

A. Yes, I do.

(Testimony of Mike Trama.)

Q. Did your family bring him here?

A. Well, we helped bring him here, yes.

Q. And Mr. Rizza, he lived in your home, did he not, or your father's home?

A. Yes, he did.

Q. And sometime during 1957 you started to build the boat Sandy Boy?

A. That is correct. [288]

* * * * *

Q. What is the custom and usage as far as hiring a man is concerned?

A. Well, the custom is that you need a man and you ask him to come fishing, and say that it is seasonable. When you do hire a man it is actually for a season as far as I can see it—

Q. At the end of the season—when the end of a season [290] approaches and you say nothing to a man, what is the result of that?

A. If you don't say nothing to him, they take into consideration that they are rehired. It isn't done by means of any letter or anything like that. It is just a verbal say.

* * * * *

Q. Did you have a contract for labor aboard the boat Fisherman? By that I mean did you have a contract with any Union concerning the men who worked aboard that vessel?

A. Yes. We had a contract with the AFL Union.

* * * * *

Q. The boat Sandy Boy was not ready to go fishing at the beginning of the sardine season in '57, was it?

(Testimony of Mike Trama.)

A. No. The boat was launched on the fourth. I think it was September 4th. [291]

Q. At that time on your crew was Vince Bulone; is that right? A. Yes, sir.

Q. Sal Lucca?

A. That is correct.

Q. Antoine Affidi?

A. Yes, sir.

Q. Rosario Rizza?

A. That is right.

Q. And Frank Ferrara?

A. Well, Frank Ferrara became later employed because we needed another man and we hired him. I mean when I say "we" I mean I hired him.

Q. Now, at any time in 1957 did you have a conversation with Mr. Bulone concerning the length of time that he would stay on the boat?

A. No. It was never discussed, the length. I mean I don't think anybody discussed the length as to how long a man is going to stay on a boat.

Q. Now, Mr. Bulone has said that in effect, you told him he would stay on the boat as long as he wanted to. Did you ever make such a statement to him?

A. I don't recall it.

Q. Now, Mr. Mudry has said that you asked your father in a conversation with him said that he could stay on the boat [292] as long as he wanted to. Did you ever make such a statement to Mr. Mudry?

A. Saying something that we were going to fish all the time, but that does not mean you can stay on the boat as long as he wanted to, because who knows what you are going to do with your boat. From one year

(Testimony of Mike Trama.)

to the other, the whole situation might change where you might sell it, you might do anything. I mean you can't say such promises or give a man such promises as that, no.

Q. Did you make him such a promise?

A. No, sir. [293]

* * * * *

Q. Sometime during September of '57 did you get a contract from Franco-Italian Packing Company?

A. Yes, I did.

Q. What, if anything, did you do with that contract?

A. Well, first I got a verbal understanding with the cannery. There were squabbles between the two Unions and they asked me what their demands were, so I went back and forth from both of the two Unions and asked, you know, try to find out what the demands were; and I understand whatever I can gather was that the ILWU was asking $80 a ton for sardines and $55 or $60 for mackerel, whatever it was. I don't recall the exact amount; and the day we went on record that [296] they were demanding or asking $80 a ton and that the AFL, I think has joined them in asking for the price. I don't know whether that was definite or not.

Q. So what did you do, go back and tell that to the cannery?

A. Yes. After I got my gathering I went back there and told them they were asking $80 for sardines and asking for mackerel $55. I said they were asking twenty-seven fifty for anchovies and the minimum of the limit was forty ton per night, and they told me this. They said what if we can meet that demand, can you go fishing. I said I don't know. I will have to take it to the Union and see whether they would agree to it or

(Testimony of Mike Trama.)

not, and when he says, well, we will give you an agreement and see what you can do with it, that's what I did. [297]

Q. Did they give it to you in writing?

A. Yes, they did.

Q. Where did you go with that contract?

A. Well, first I went to see John Calise. The reason I wanted to see John Calise was because during the squabbles the Unions had passed that these men can go to work on any boat removing a boat, removing a net and do anything at all on the boat and so the boat wasn't quite ready. After I got in the water I went to the AFL to ask permission if these men can give me a hand and finish getting the boat ready, and they granted it. They said that they can go ahead and finish for about three days or whatever it was. I don't recall.

Q. You took it to him and he wouldn't talk on it?

A. That's right.

Q. You took the contract to Mr. Calise but you got nowhere with it, is that right?

A. Not at that time, no.

Q. Did you show the contract then to Mr. Royal or Mr. Columbic?

A. Yes, I did.

Q. What, if anything, did they tell you?

A. Well, they asked me, they said, well, what about these men, which Union do they belong to? I said there is a few they told me that they belonged to the AFL, and there was a [298] few that told me they belonged to the ILWU. I said I don't know, and then they asked me if I would bring them in and they wanted to talk to them, and see who the men were and I said yes, I would.

(Testimony of Mike Trama.)

Q. Was Mr. Mudry with you at that conversation?

A. I don't recall whether he was with me the very first time or not.

Q. What did you subsequently do?

A. Would you repeat that?

Q. What did you do after that?

A. Well, I went back and talked to Nick and asked him told him what the demands were and he says, well, he says, well, he says, we'll see what we can do to go fishing, and he came along with us on one occasion when I went to see Calise with the contract.

Q. Was he a member of either Union then, if you know?

A. He told me that he wasn't.

Q. Now, do you recall what Union he joined?

A. Yes, he joined the ILWU Union. [299]

* * * * *

Q. Now, did you ever see any representation that these [300] men had authorized either Union to represent them?

A. Yes. I saw authorization signed by—let's see. Nick Mudry, Vince Bulone, Frank Ferrara, and three men. The authorization to check off their dues and their Union dues, whatever it was.

Q. What if anything, did you do after that was exhibited to you, after it was shown to you after Mr. Columbic, Mr. Royal showed you this authorization? Did you enter into some agreement with them?

A. Well, we entered an agreement. I think it was the—I mean we went back and forth bickering about what percentage I should have gotten, you know, and

(Testimony of Mike Trama.)

what kind of arrangements there was to be made. We didn't come to an agreement right away, no.

Q. After you saw this authorization you subsequently did enter into a contract that is now before the Court?

A. Yes, we did.

Q. And you went fishing?

A. I think it was the following day after we signed the contract. I am pretty sure that it was.

Q. That was the first day that you delivered fish to Franco-Italian. Were there some men representing themselves to be pickets?

A. Yes, there were.

Q. Did you continue to deliver fish to Franco-Italian? [301]

A. We delivered to there, continuing fishing for about five nights or six nights I think it was. I don't know.

Q. What, if anything, happened after that five or six deliveries?

A. Well, as I remember, we resumed fishing again the following month. As we come in with the load with some fish, I wouldn't say a load, with some fish that we had some trouble unloading.

When I tried to get hold of the fleet manager, I told him what seems to be the trouble, and he said just wait a minute. We waited, and he told me to keep waiting awhile. The more I told him we got fish in the boat, they are going to spoil, I said we want to unload and he told me to wait until Joe gets here or wait until somebody gets here, and about that time it was about three or four o'clock in the afternoon.

We couldn't unload that fish into the cannery, and

(Testimony of Mike Trama.)

we had to bring it to a market because it got to a point where it would spoil more.

Q. When you took that fish to a market, were you paid for it?

A. No. We weren't paid at all. It wasn't in suitable condition to be packed or to do anything with it.

Q. Your boat doesn't have refrigeration on it, does it?

A. It does not, no. [302]

Q. Did anyone tell you why they wouldn't unload the fish?

A. He told me, he says, that if he would take my fish and put it in the plant, he was afraid that the cannery workers would walk out of the plant due to the fact that they had a letter from the Cannery Workers' Union that they were being claimed unfair by the AFL Union.

Q. Did you talk to any representatives of the Cannery Workers' Union?

A. Not that day, I didn't no, but I did later on.

Q. To whom did you speak?

A. Well, as I recall, I went to go back a little bit to where we talked to him. The very first day we came in we had trouble. We went in to see Mr. Tommy Ivey and Mr. Gomez.

Q. Now, this fish that you couldn't get delivered, did you have an order from the Cannery to bring that fish in?

A. Well, I thought I had an order for it, because I had a contract with them. I thought my order was good.

(Testimony of Mike Trama.)

Q. Did they think so after you got the fish there, meaning the cannery?

A. Would you repeat that question?

Q. Did the cannery believe that you had the right to bring that fish in when you got it there?

A. Well, at first I think they did, yes. [303]

Q. Did you bring in any fish thereafter?

A. Well, after we bring those fish we said—we waited awhile to see what we can do to get this mess straightened out, but maybe a week, I think we were going to try it again and the same procedure followed.

Q. At about this time, Mr. Trama, did the Unions settle their differences and the entire fleet go out?

A. I think they did, yes.

Q. Did the entire fleet fish on the—that is, did the entire fleet fish unmolested for the rest of the year?

A. Yes, they did.

Q. Did you?

A. No, we were tied up.

Q. In effect, you lost the rest of the season, did you not? A. Yes, we did.

Q. Did you make any efforts to go out fishing during this period of time?

A. Yes. We went to see Mr. Margolis. We went to see John Royal. We went to see Tommy Ivey from the Cannery Workers' Union. Went to see the District Attorney. We were going from one place to another trying to get some kind of release, some kind of help. We even went to the NLRB.

Q. Did you accompany me to the NLRB in this building?

(Testimony of Mike Trama.)

A. Yes, we did, went together. [304]

Q. Did we have a conversation with—

A. Mr. Fisher.

Q. Do you recall what Mr. Fisher told you?

A. Yes, Mr. Fisher asked me whether the boat had made $50,000 business for the year. I think it was $100,000 business for the year, and I told him it was a new vessel, just had been launched in September. I told him previously I had the boat Fisherman in which it did not make $100,000 business for the year.

Q. What did he tell you?

A. He turned down, as I recall, he turned down our application for it. He said we don't come under the jurisdiction or something like that.

Q. Did you consult with any legal counsel as to what you could do legally other than through the NLRB?

A. Yes. I consulted with Mr. Margolis, consulted you, Miller, another attorney.

Q. Did you also consult the Union Attorney, Mr. Di Macele?

A. Yes, I did.

Q. Now, I want to call your attention to this lawsuit in which Franco-Italian Packing Company, Seine & Line Fishermen's Union, John Calese, Nick Pecoraro, Pete Di Meglio and yourself and your father are named as defendants?

A. Yes, I recall.

Q. Now, prior to that action which was filed on October [305] 28th, did you ever notice that the crew members were considering filing such action? Before they filed it, did you know that it was going to be filed?

A. Yes, I knew.

(Testimony of Mike Trama.)

Q. Did you have occasion to talk to Mr. Royal or Mr. Columbic of Local 33 concerning that lawsuit?

A. Yes. As I understand it, they were going to sue the cannery and the Union, and everybody else included, but they never mentioned that I was going to be sued in it.

Q. Did they ask you to be a plaintiff in it?

A. Yes, Mr. Margolis did ask me in the way that he said if I got in the lawsuit, it would be a better lawsuit.

Q. What did you do?

A. I told him that I couldn't go ahead and get in it, in the lawsuit, and I said the only thing I wanted to get interested in is going fishing and not get involved in any lawsuits.

Q. Did you have any further conversation?

A. Yes, I had several conversations with Mr. Margolis and John Royal, and I told them that I was willing to pay an attorney fee, that was—that for them to try to give me fishing. I told them that I thought I had a valid contract with the ILWU and therefore they should try to do everything they could to make me go fishing and try to give me fishing. Nothing happened in that case, nothing at all. The only [306] thing they told me, they said we got to sue them. You got to get in the lawsuit.

Q. Did you ask them whether or not the lawsuit would get you fishing?

A. I asked them, and they didn't think so.

Q. After that did you have conversations with Mr. Calese as to whether or not he would make any objections to your going fishing?

A. I beg your pardon?

(Testimony of Mike Trama.)

Q. Did you ever have a conversation after that with Mr. Calese?

A. Well, I tried to see Nick first. I think through Nick I got to see John Calese.

Q. That is Nick Pecoraro.

A. Nick Pecoraro.

Q. Is he an employee of the Seine & Line Fishermen's Union? A. Yes, he is.

Q. What happened?

A. Well, I was trying to get to Nick and ask him what we would have to do in order to clear ourselves or have them release us in order for us to go fishing. I told him that the members had picketed ILWU, picketed as a bargaining agent. I said where does it put me? I said the only thing I can do is what the crew wants. I said that's why I signed a contract [307] with the ILWU, and they say that these men belong to the AFL.

Now, I don't know who to believe. I didn't know whether to believe the crew or believe the Unions or what to believe.

Q. Did you ask Mr. Calese anything about arbitrary measures arbitrating the matter?

A. Yes, I did. I said why don't we set an arbitration, call both parties and have the men pick out which Union they want, and you two Unions will come to an understanding. I guess one side was too proud to ask the other side to call in an arbitration or rather Calese wanted it. If Calese wanted it the other side didn't want it.

Q. Did you care at that time what Union these members, these men were members of?

A. No, I didn't care at all what Union they picked.

(Testimony of Mike Trama.)

Q. In one way or another did you ascertain from the Seine & Line Fishermen's Union what they thought these men would have to do for you to go fishing?

A. Well, they told me the men should come in since they are members, they said they will have to come in and be reinstated in the Union. That's what they told me, and they said, due to the fact that you guys went fishing when everybody else was tied up, he said that was some kind of penalty. What the penalty was, they gave me an idea, but they didn't [308] say how much.

Q. What were you to do with that information, if anything?

A. Well, I was to bring it back to the crew and told them what the Union, because what the Union wanted. In otherwords, he said bring it back to the guys and see what they want to do with it.

Q. And did you do that?

A. I just related what they told me to the crew, yes.

Q. Did you ever tell the crew what to do concerning those demands of the Union, of the AFL-CIO Union?

A. Well, yes, because they were asking me when we go fishing. They were just as concerned as I was. They wanted to know what was going on, and I would tell them.

Q. Did you ever tell them what you, Mike Trama, wanted them to do?

A. No, I didn't tell them what I wanted. It was whatever Calese demanded from us to go fishing.

Q. Did you subsequently take the boat out fishing; did you go out fishing again with the boat later in that year of 1957?

(Testimony of Mike Trama.)

A. Yes. We went fishing. When we had an order from the market. That is the way we could go fishing if the market bought some fish, because we couldn't go to the cannery.

Q. Later, Franco-Italian obtained a temporary injunction, didn't they? [309]

A. Yes, they did. [310]

* * * * *

Q. Mr. Mudry has said that you last went out fishing for the market when he was on the boat, that you told him that you were speaking to him as a father and telling him what to do. Did you say that to him?

A. Well, I said something that since we can't, we can't come to an agreement or get, or we can't get a release and that you fellows don't want to do anything at all, I told him the best thing for us to do to seek some employment until we can straighten this mess out which I was one of them. I went to work for my brother.

Q. Did you ever tell him or the crew on that voyage that "I will fire you and tie up the boat"?

A. I said that we were forced to tie the boat up because we can't get any orders.

* * * * *

Q. When did you decide that you would not rehire these men after January 1, 1958? [311]

A. Well, for one thing, as to that, they knew how hard I tried to get the boat released and some of the occasions Nick was with me. Maybe a couple of other times. They knew how hard I tried to go fishing and yet they put me as a party defendant on a lawsuit for about $100,000. That kind of gave me an idea that

(Testimony of Mike Trama.)

these men couldn't be trusted, and furthermore, I started to lose confidence in them.

Q. Now, did they also discuss this matter in your presence, the $100,000 lawsuit?

A. Yes, they wanted me to join in it. They were, they claimed I should have been in it, and suing everybody under the sun, I guess.

Q. What effect did it have on you when talking about it?

A. You mean this lawsuit? [312]

* * * * *

Q. (By Mr. Miller): The question is: What effect did the conversations have on you physically?

Mr. Margolis: I object to that as immaterial.

Trial Examiner: I will overrule the objection. The conversation is about the lawsuit in your presence, what effect did it have on you?

The Witness: I get excited. Who wouldn't get excited?

Q. (By Mr. Miller): Did you ever ask them to stop doing that?

Trial Examiner: Doing what?

Q. (By Mr. Miller): Talking about the lawsuit?

A. Yes. I told them that if they were going to sue, to go ahead and sue but don't talk about it. I said, I got all excited, I mean they just—

Q. Let's go back to Mr. Affidi. Did you know Mr. Affidi was going to Algiers?

A. Well, he told me earlier in the year sometime, I don't recall when, but perhaps after the season or right along in there, he was going to go back to Algiers.

(Testimony of Mike Trama.)

His reasons, he never gave them to me. But I knew about it.

Q. Prior to his leaving for Algiers, did you ever tell him he was fired? A. No, sir. [313]

* * * * *

A. I told them about a week before the season ended. I told the boys, I said, "I think you fellows had better look for a job after the sardine season which" I said, "ends December 31st. I think you had better look for employment at the end of the year."

Q. Now, Mr. Affidi wasn't on the boat at that time nor Mr. Mudry, were they?

A. No, they weren't.

Q. Did you have other men replacing them?

A. Yes, I did.

Q. Were those men members of the crew in 1958?

A. Yes, they remained for about—one man remained for all year and one for three or four months, and then he quit and went south.

Q. Now, at this time Mr. Trama, do you care which Union these men are members of?

A. No, I don't.

Q. Is there any financial advantage to you whether they are members of one Union or the other?

A. No financial at all. I mean the boat only gets so much [315] regardless. They go one Union or the other.

A. The dues are the same.

Q. One half of one percent deducted of the crew earnings for social welfare?

A. Yes, it is about the same thing. I mean it would

(Testimony of Mike Trama.)

be within a dollar or two difference. I mean it doesn't amount to anything hardly.

* * * * *

Q. What I am asking you, did you ever tell them that if you don't drop the lawsuit against the Seine & Line Fishermen's Union, I will fire you?

A. No, I don't think I ever said that.

Q. Now, subsequently, Mr. Trama, these same men with Mr. Margolis as their attorney sued you in Long Beach, did they not?

A. This was a lawsuit in Long Beach; which one are you referring to? [316]

Q. I am talking about the one for wages in helping you out with the boat?

A. Yes, sir, there was a lawsuit there, yes.

Mr. Miller: I don't think I have anything further.

Trial Examiner: Any questions?

Mr. MacKenzie: May I have a minute?

Trial Examiner: Off the record.

(Off the record discussion)

Trial Examiner: On the record.

Mr. MacKenzie: I will defer to Mr. Margolis at the moment.

Trial Examiner: All right.

Cross-Examination

Q. (By Mr. Margolis): Mr. Trama, I am showing you General Counsel's Exhibit 7 which is the agreement that you signed with Local 33 on September 27th, 1957. Do you recognize that document?

A. Yes.

(Testimony of Mike Trama.)

Q. I call your attention to this clause. [317]

* * * * *

Q. During the period of time that you fished, well, during the month of September, let's say, you did some fishing and then you made an account. Did you make deductions of $2.00 a month per man and one-half of one percent of the net?

A. May I ask you which September?

Q. 1957 I am talking about.

A. Yes, I did. [318]

* * * * *

Q. Now it is also a fact, isn't it, that the AFL charges $1.00 a month and not $2.00 a month?

A. Yes.

Q. Now, I show you your settlement sheets and show you that in February of 1958 the dues that you deducted in the first place were $1.00 a month and not $2.00 a month. How did you decide that you were going to deduct $1.00 a month and not $2.00 a month in 1958 if you didn't know what Union you were deducting dues for?

A. Well, as you can see, Mr. Margolis, the figures are very small, such as $98 for a month. I thought we'd just take $1.00 out, not knowing which Union we were going to give that money to yet. [319]

* * * * *

Q. You testified that it is not customary to tell men at the end of the season in writing to come back to work the next season. They just come back, is that right?

A. I mean if either party don't say anything, they just come [324] back.

(Testimony of Mike Trama.)

Q. Is it customary to write also to men at the end of the season telling them that they are fired?

* * * * *

The Witness: Well, it isn't customary but I mean if you are going to tell a guy if your word is no good, no more, you have to put it in writing, I mean they can say well you said it may be. You said it, so we had to put it in writing. [325]

* * * * *

Q. Now, let's go to the question of my discussions with you, Mr. Trama. We had two or three discussions, did we not? A. Yes, we did.

Q. These took place, did they not, all took place at Local 33's hall in San Pedro?

A. Yes, that is right.

Q. And you asked to talk to me, did you not, the first time at least? I don't know about the second.

A. I think about the first time I asked to talk to you, yes.

Q. You asked to talk to me. There were present at the time that you talked to me John Royal and Mel Columbic and some other crew members?

A. There could have been, yes.

Q. I remember that you said to me what can I do about going fishing. You know that they are stopping me from going fishing. What am I going to do. Is that right?

A. Yes. As a lawyer for the union I felt that you should have known what I should have done.

Q. Do you remember that I told you that I was afraid that the Labor Board would not take jurisdiction of your case [327] at this time under the standards

(Testimony of Mike Trama.)

that they had certain rules which would stop the Labor Board from taking your case at that time; do you remember me telling you that?

A. I don't recall, Mr. Margolis.

Q. Do you remember me saying that there was another section of the law where you could sue for damages and that the Court would hear that case. Do you remember me telling you that, that you could sue for damages? A. Yes.

Q. Do you remember my saying that the reason you could sue for damages was because there was a secondary boycott?

A. Yes, I remember that.

Q. Do you remember me telling you that I thought you had a cinch case?

A. You could have said that, yes.

Q. And you asked me, do you remember, you were asking me whether you filed that suit that I could guarantee that you could go fishing or something like that, whether I would assure you that you could go fishing or guarantee that you would go fishing if you filed the suit?

A. I think I asked you, Mr. Margolis, if you could—any possible way that you could get us fishing without a lawsuit, and you said no.

Q. That is right.

A. May I finish, please? [328]

Q. Sure, go ahead.

A. I think you told me that the only way is to go to Civil Court and for you to join the suit and go to trial to get an injunction. That is what you told me.

Q. Are you sure we were trying to get—

(Testimony of Mike Trama.)

A. Possibly you said we would obtain an injunction.

Q. Do you remember me telling you that you had a very strong case for damages?

A. You could have said that, yes.

Q. Do you remember my telling you that if you filed a lawsuit for damages you could collect and if they still let you go fishing you could collect for what you lost because they wouldn't let you go fishing?

A. I think you said that, yes.

Q. Didn't I tell you that if you filed this kind of a lawsuit that I thought that the attorneys on the other side would be crazy to let the secondary boycott go on, and I thought they would probably stop it if you filed the lawsuit, but that I couldn't guarantee that they would?

A. I think you put it in somewhere along those lines, I mean. I don't know whether that was the exact words or not.

Q. Of course, but I said that is the idea?

A. Yes.

Q. Do you remember at first you said well that you thought that was a good idea and you thought you would go along with [329] such a lawsuit?

A. I might have said that, yes.

Q. And then later on you told me that you had talked to your own attorney and that you had changed your mind?

A. Yes. I said that I had changed my mind and the reason—may I explain it at this point, what my reasons were?

Q. Yes, surely.

(Testimony of Mike Trama.)

A. I thought that if I would go ahead and sue the cannery and that I would get involved in a lawsuit my chances were too great for me not ever to get an order for marketing fish or anything like that. I didn't want to get involved in suing the cannery because I would just have to sell my boat and go somewhere else and start all over again. That is the reason I—

Q. Do you remember that I told you at that time that your suit could be just against the cannery workers Union and the fishermen's union for the secondary boycott, but that you didn't have to sue the cannery?

A. I don't recall that. I think you said we have to sue everybody who was involved in there.

Q. You don't remember my saying that you could sue just the two unions that were stopping you from going fishing?

A. I don't recall, Mr. Margolis, that way.

Q. Do you remember my saying to you—you kept saying wouldn't the union let me out of my contract; you kept [330] saying to the union officials wouldn't you let me out of my contract with you?

A. I don't know what you mean by that, Mr. Margolis.

Q. Well, didn't you say to the union officials and to me as long as you can't protect me from going fishing, you should let me free from my contract. You should let my contract go?

A. Well, I said if there were any other means for me to get fishing, I said would I—I said would you let me go fishing even though you have to give up the contract. I might have said.

Q. Yes, something like that.

A. Yes.

(Testimony of Mike Trama.)

Q. Do you remember that I said that the union's position was that the law was being violated, that there were illegal acts being committed and that the union was not going to give way to those illegal acts but that it was going to fight and it was up to you to stand up and fight against these illegal acts. Do you remember my saying something like that?

A. I don't think you put it such as you are putting it now, Mr. Margolis.

Q. Well, do you remember my saying that the union wasn't going to let these people get away from that and just turn the contract over to somebody else? [331]

A. Well, you told me that you wouldn't give up the contract, I remember that.

Q. Well, do you remember my saying that the union position was not to let them get away with breaking the law as they were doing?

A. You told me they were breaking the law, whatever was involved, I don't know.

Q. Do you remember my saying to you that if you stand up and fight on this, you have got the law on your side and you and the crew can get what you got coming to you and that the other side is going to have to give up on this case; you got such a strong legal case?

A. I think if I recall, Mr. Margolis, I also told you my kids cannot eat and my bills can't get paid on a lawsuit. I had to go fishing and I also said that these men here can't wait until the lawsuit is pending or before we collect, before we pay our bills, and it seems like with your so-called contract we couldn't go fishing.

(Testimony of Mike Trama.)

Q. Do you remember, Mr. Trama, my saying to you during that period of time that if you filed such a lawsuit, and you became a party to it, that I thought that it was very probable that the secondary boycott would be ended while I can't guarantee it.

A. You couldn't guarantee it. That would mean—

Q. But you remember me saying that? [332]

* * * * *

GENERAL COUNSEL'S EXHIBIT 2

United States of America
Before the National Labor Relations Board
Twenty-first Region

Case No. 21-CA-2904

MIKE TRAMA (F/V SANDY BOY)
and
FISHERMEN'S UNION, LOCAL 33, ILWU

STIPULATION

It is Hereby Stipulated and Agreed by and between Mike Trama (F/V Sandy Boy), Fishermen's Union Local 33, ILWU, and the General Counsel of the National Labor Relations Board, by their respective counsel, that if Mr. Earl W. Deharak were called to testify, he would testify under oath that he is Office Manager and Comptroller of Franco-Italian Packing Co., hereinafter called Franco-Italian; that he is in charge of the books and records of Franco-Italian; and that based on an examination of said books and records, and to his personal knowledge, Franco-Italian during the calendar year 1958 shipped products in excess of $50,000 in value directly to points outside the State of California.

/s/ HOWARD E. MILLER
Attorney for Mike Trama

BEN MARGOLIS,
Margolis, McTernan and Branton, by
Ben Margolis, Attorneys for Fishermen's Union, Local 33, ILWU

/s/ SHERWIN C. MacKENZIE, JR.
Counsel for General Counsel, National Labor Relations Board

Dated at .....

California this ..... day of April, 1959.

Admitted in Evidence April 13, 1959.

GENERAL COUNSEL'S EXHIBIT 9-A

NOTICE

To: Vincenzo Bulone
1226 — 18th Street
San Pedro, California

This is to advise you that under the terms of your employment by the Boat Sandy Boy, you were hired for the sardine fishing season of 1957, which concluded December 31, 1957. The undersigned does not desire to employ you further for the period commencing January 1, 1958.

As orally requested a few days ago when you were notified of this decision on the part of the undersigned, you are requested to forthwith remove your belongings from the Boat Sandy Boy.

Dated: January 2, 1958.

BOAT SANDY BOY
/s/ By MIKE TRAMA
Mike Trama

Admitted in Evidence April 13, 1959.

GENERAL COUNSEL'S EXHIBIT 9-B

NOTICE

To: Nick Mudry
4748 Albaury Street
Lakewood, California

This is to confirm the status of your employment by the undersigned as the operator of the Boat Sandy Boy.

You were hired for the sardine fishing season of 1957 which came to a close December 31, 1957.

On or about December 15, 1957 when the Boat Sandy Boy resumed fishing, you advised the undersigned you had employment elsewhere and you would no longer honor your contract with the Boat Sandy Boy, fulfilling the responsibility of the terms of your employment. In accordance with your desire, the undersigned accepted your resignation as an employee of the Boat Sandy Boy.

This is to advise you that, based upon your voluntary departure from the employ of the Boat Sandy Boy and the terms of your employment which of itself terminated December 31, 1957, your services are no longer required by the undersigned.

Dated: January 2, 1958.

BOAT SANDY BOY

/s/ By MIKE TRAMA
Mike Trama

Admitted in Evidence April 13, 1959.

GENERAL COUNSEL'S EXHIBIT 9-C

NOTICE

To: Frank Ferrara
823 W. 18th Street
San Pedro, California

This is to advise you that under the terms of your employment by the Boat Sandy Boy, you were hired for the sardine fishing season of 1957, which concluded December 31, 1957. The undersigned does not desire to employ you further for the period commencing January 1, 1958.

As orally requested a few days ago when you were notified of this decision on the part of the undersigned, you are requested to forthwith remove your belongings from the Boat Sandy Boy.

Dated: January 2, 1958.

BOAT SANDY BOY

/s/ By MIKE TRAMA
Mike Trama

Admitted in Evidence April 13, 1959.

GENERAL COUNSEL'S EXHIBIT 9-D

NOTICE

To: Sal Lucca
384½ W. 12th Street
San Pedro, California

This is to advise you that under the terms of your employment by the Boat Sandy Boy, you were hired for the sardine fishing season of 1957, which concluded December 31, 1957. The undersigned does not desire to employ you further for the period commencing January 1, 1958.

As orally requested a few days ago when you were notified of this decision on the part of the undersigned, you are requested to forthwith remove your belongings from the boat Sandy Boy.

Dated: January 2, 1958.

BOAT SANDY BOY,
/s/ By MIKE TRAMA
Mike Trama

Admitted in Evidence April 13, 1959.

[Endorsed]: No. 17041. United States Court of Appeals for the Ninth Circuit. National Labor Relation Board, Petitioner, vs. Mike Trama, Respondent, Transcript of Record. Petition for Enforcement of an Order of the National Labor Relations Board.

Filed: September 21, 1960.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the Ninth Circuit.

ent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceeding set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said order of the Board, and requiring Respondent, his agents, successors, and assigns, to comply therewith.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel
National Labor Relations Board

Dated at Washington, D. C. this 8th day of August, 1960.

[Endorsed]: Filed Aug. 10, 1960. Frank H. Schmid, Clerk.

[Title of Court of Appeals and Cause]

ANSWER OF RESPONDENT TO PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD, AND CROSS-PETITION FOR REVIEW OF SAID ORDER

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now Mike Trama, Respondent in the above entitled proceeding, and pursuant to the National Labor Relations Act as amended (61 Stat. 136, 29 U.S.C., 151 et seq., as amended by 73 Stat. 519), hereinafter called "the Act", and Rule 34 of the Rules of this Honorable Court, hereby files his answer to that certain Petition for Enforcement for an Order of the National Labor Relations Board dated August 8, 1960, and his Cross-Petition for Review of said Order issued by the National Labor Relations Board on November 17, 1959. In support of his Answer and Cross-Petition for Review, this Respondent respectfully shows as follows:

(1) This Respondent denies the allegations contained in Paragraph 1 in its entirety, save and except that Respondent admits his activities of a business nature occurred in the State of California and within this Judicial Circuit and admits this Court has jurisdiction of the Petition referred to herein.

(2) Respondent admits the allegations contained in Paragraph 2 of said Petition for Enforcement, except insofar as it is alleged that the proceedings before the Board were "duly . . . had; and that the Boards findings of fact, conclusions of law, and Order were "duly stated

. . . and issued", and as to such excepted allegations, the same are denied by this Respondent.

(3) This Honorable Court has jurisdiction to entertain this Respondent's Cross-Petition for Review and to set aside the Order of the Board as prayed for herein by virtue of Sections 10(F) and 10 (E) of the National Labor Relations Act as amended [29 U.S.C. 160(F) and 160(E)].

(4) This Respondent alleges that the decision and Order of the Board herein is based wholly upon the findings, conclusions and recommendations of the Trial Examiner, as modified therein, which the Board adopted as its own, and that said findings and conclusions as adopted by the Board are not supported by reliable, probative and substantiating evidence, considering the record as a whole, but rather, are wholly based upon unwarranted inferences, assumptions and conjectures, unfounded suspicions, conclusions and surmises, and uncorroborated hearsay, and from incompetent and inadmissible evidence, contrary to Sections 10(B), 10(E) and 10(F) of the National Labor Relations Act as amended and the standard or proof imposed upon the Board by said Act and by Section 7(C) of the Administrative Procedure Act, as interpreted by applicable decisions of the Supreme Court of the United States and of the Honorable Court of Appeals for the Ninth Circuit.

(5) This Respondent further alleges that in review of the lack of jurisdiction, of other action of Board involving this Respondent, and of substantial evidence before the Board that Respondent caused or attempted to cause prohibited discrimination against, or engaged in restrainant or coercion of any employee, including the

charging parties, within the meaning of the Act, the "remedial" provisions of the Board's Order in this case and, more particularly, the provisions for notification, back pay, and posting of notices, are arbitrary, without legal or equitable justification, and contrary to the provisions of the Act and, therefore, should not be enforced by this Honorable Court.

(6) This Respondent further calls to the attention of this Court and alleges that in November of 1957 the Board, through its agent Leo Fischer in Los Angeles, California, refused to accept a Petition for Certification by Respondent herein upon the basis Respondent's volume of business did not meet the jurisdictional limits of the Board, that on March 21, 1958, in NLRB Case No. 21RM471, the Board again refused jurisdiction of Respondent for lack of dollar volume business to meet the jurisdictional standards and, as late as July 15, 1960, in NLRB Case No. 21RC623, the Board again refused to take jurisdiction of Respondent for lack of dollar volume, and in view of the action of the Board in the aforementioned matters, Respondent alleges that enforcement of the Board's Order herein, requiring the payment of back pay to the charging parties, would be inequitable and not legally justified under the Act.

Wherefore, based upon the above stated ground, this Respondent prays this Honorable Court that it cause Notices of the filing of this Answer and Cross-Petition for Review to be served upon the Petitioner, National Labor Relations Board, and that this Court exercise its jurisdiction in the premises to review the pleadings, testimony and evidence, and the Boards decision and Orders, not only as set forth in the certified transcript of the entire record which the Board has stated it is filing herein, but also in all other matters wherein the Board has

refused to accept Petitions involving this Respondent and, thereafter, enter its Decree denying the Petition to Enforce the Board's Order with respect to this Respondent, his agents, successors and assigns, and set aside, vacating and annulling the whole of said Order to the Board dated November 17, 1959.

Dated this 29th day of August, 1960.

Respectfully submitted,

HOWARD E. MILLER,
Attorney for Respondent Mike Trama

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Aug. 30, 1960. Frank H. Schmid, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS RELIED UPON BY THE BOARD AND DESIGNATION OF PARTS OF THE RECORD NECESSARY FOR THE CONSIDERATION THEREOF

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now the National Labor Relations Board, petitioner herein, and pursuant to Rule 17 (6) of the rules of this Court, files this statement of points upon which it intends to rely in the above-entitled proceeding, and this designation of parts of the record necessary for the consideration thereof:

I.

Statement of Points.

A. The Board's decision to assert jurisdiction in this case was a sound exercise of its discretion.

B. Substantial evidence on the record as a whole supports the Board's finding that respondent interfered with, restrained or coerced his employees in violation of Section 8 (a) (1) of the Act.

C. Substantial evidence on the record as a whole supports the Board's finding that respondent, in violation of Section 8 (a) (3) and (1), discharged his crew because they refused to get reinstated in Seine & Line Fishermen's Union of San Pedro.

* * * * *

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel
National Labor Relations Board

Dated at Washington, D. C. this 15th day of Sept., 1960.

[Endorsed]: Filed Sept. 17, 1960. Frank H. Schmid, Clerk.

No. 17042

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HEAREVER CO., INC., RESPONDENT

On Petition for Enforcement of An Order of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
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National Labor Relations Board.

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AUTHORITIES CITED

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HEAREVER CO., INC., RESPONDENT

On Petition for Enforcement of An Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151 *et seq.*),[1] for enforcement of its order issued against Hearever Co., Inc., referred to herein as Hearever or the Company, on November 25, 1958. The Board's

[1] The pertinent statutory provisions are printed *infra*, pp. 21-22.

decision and order (R. 5-9)[2] are reported at 122 NLRB 208. This Court has jurisdiction, the unfair labor practices having occurred at the Hearever plant in Castro Valley, California, where the Company is engaged in the manufacture and sale of miniature crystal radio sets.[3]

STATEMENT OF THE CASE

I. The Board's findings of fact

Briefly, the Board found that Hearever interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act by circulating a petition for a company union, by granting a wage increase for the purpose of defeating the organizational efforts of the employees, and by threatening to close or move the plant in the event they selected the Union[4] as their collective bargaining representative. The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by discharging employees Chisholm and Hedstrom because of their union activities. The subsidiary facts upon which the Board's findings are based are set forth below.

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[2] References to portions of the printed record are designated "R." Wherever a semicolon appears, the references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

[3] Respondent admittedly makes substantial sales and shipments in interstate commerce (R. 10; 3, 40), and no jurisdictional issue is presented.

[4] International Association of Machinists, District Lodge No. 115, AFL-CIO.

A. *Organizational activity begins among the employees and Hearever learns of it*

Hearever began operations in early July 1957, employing some 20 to 30 persons, mostly women (R. 11; 51, 139). In early September, a union other than the one involved herein started organizational activities among the Company's employees (R. 11; 138, 149-150). Mrs. Betty Jayne Remer, Hearever's president, first became aware of these activities about the middle of September when one of its representatives handed her a pamphlet in the parking lot at the rear of the plant (R. 11; 145-146).

About September 13 the Machinists' Union started its organizational drive and scheduled a meeting of employees for September 24 (R. 12; 41-42, 46, 64). On September 23, the Company granted a general wage increase (R. 25; 52). Late in the afternoon of the day of the meeting, one of the employees invited Mrs. Remer to attend it but she declined the invitation (R. 12; *infra*, p. 27).[5] At the close of work a group of the employees crossed the street to attend the meeting which was held in a cafe directly across from the plant (R. 12; 42, 69). The windows of Mrs. Remer's office overlooked the street and the cafe entrance and Mrs. Remer and her secretary, Louise Stewart, watched the employees enter the cafe and exchanged remarks such as "there goes two more" and "what a dirty trick" (R. 12-13; 42, 132-133, 158, *infra* p. 27).[6]

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[5] Portions of the transcript of evidence which were omitted from the Record Appendix are set forth *infra*, pp. 25-29.

[6] Although Mrs. Remer may not have been in the office at the moment the employees left the plant, the testimony

At the meeting, most of the employees signed union authorization cards and employees Sharon Chisholm and Mary Hedstrom were elected shop stewards (R. 12; 46, 70-71, 98). As set forth *infra*, pp. 6-9, Chisholm and Hedstrom were discharged on October 1.

In the meantime, on the day following the union meeting, Hearever's attorney addressed the employees at the plant and explained their rights under the Act to engage in or to refrain from engaging in union activity (R. 13; 43-45). A copy of his statement was posted on the bulletin board (R. 13; 45).

B. *Respondent counters the organizational drive by granting a wage increase, by circulating a petition for a company union, and by threats to close or move the plant*

On September 27, 3 days after the union meeting and 4 days after the general wage increase on September 23 (see *supra*, p. 3), the Company announced another general wage increase (R. 25; 52, 177).

During this same period, supervisor Emery [7] went

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of her secretary, a witness for respondent, makes it clear that she was there almost immediately thereafter (R. 12; 157-158). Stewart admitted that she herself "saw the employees go in the [cafe] door" and that she and Mrs. Remer "probably" discussed the meeting while it was going on (R. 13, n. 2; 158, *infra*, p. 29). In a sworn statement given to a Board representative, Stewart stated, "We undoubtedly did discuss this meeting" (R. 158).

[7] The Board's reasons for rejecting respondent's contention that Norma Emery, or Judy as she is usually referred to in the record, was not a supervisor are set forth fully *infra*, pp. 10-12.

to Mrs. Remer and asked her advice about the formation of a company union (R. 14; 115-116). Mrs. Remer said that Emery could type a heading on a sheet of paper like "We, the undersigned, would like to form our own union" and then "broach the girls and see how they felt about it" (R. 14; 116). If they did not want to sign, Mrs. Remer said, "it would not be held against them" (R. 116). At Emery's request, Mrs. Remer's secretary typed the petition and Emery took it to a number of employees but had no "luck" (R. 23; 116, 118). She left it on her work table at the end of the day and it was gone when she returned the next morning (R. 117).

As set forth *supra*, p. 3, the plant had begun operating only the previous July and, as the employees knew, many of the parts for its miniature radios were obtained from Japan (R. 28; 55). On some unspecified date, Mrs. Remer told supervisor Emery that Mr. Browner, who was one of the directors of the Company, was in Japan "looking over a factory" and stated that the work could be done more cheaply there (R. 28-29; 118-119, 149). Although, as the Board noted, there is no evidence that supervisor Emery repeated Remer's remarks to any employee, they make understandable the employees' concern over the widespread rumor that the plant would close or move in case the Union was successful (R. 29; 55, *infra* p. 24). Two employees questioned Mrs. Remer about the rumor. Mary Preston asked if Mrs. Remer intended to close the plant if the Union came in, and Remer replied, "Yes" (R. 29; 55-56). Perri Nelson testified that when she mentioned the rumor, Remer

laughed and said that it was a ridiculous idea, that she had not said anything like that (R. 30; *infra* p. 24). On another occasion Mrs. Remer told employee Henning that if the "Machinist Union got in there she would have to close down, or that she could go to Japan and she could get the work done much cheaper, and that her parts were made there" (R. 29; 58). Mrs. Remer also told Henning that she "could go down the coast possibly and set up with cheaper labor" (R. 29; 58).

C. *Respondent discharges union stewards Chisholm and Hedstrom*

Sharon Chisholm and Mary Hedstrom were admittedly two of the Company's top producers, and Mrs. Remer testified that Chisholm's work was "excellent" (R. 17-18; 143, 169-170). In addition, Chisholm admittedly had a very low rate of "rejects" for defective work and supervisor Emery testified that Hedstrom had so few rejects that when she did have one, jokes were made about it (R. 17; 143, *infra* p. 19).

During the coffee break in the plant on the morning of the September 24 meeting, Hedstrom told the other employees about the meeting to be held at the close of work that afternoon (R. 21, n. 7; 41-42 *infra* pp. 23, 24, 25). As set forth *supra*, p. 4, at the meeting Hedstrom and Chisholm were elected the two union stewards. Furthermore, both distributed union authorization cards in the plant during "breaks" and a few days before her discharge, Manager Remer saw Hedstrom distributing cards on the plant parking lot after work (R. 84-85, *infra* p. 26). Sometime

prior to September 20, Mrs. Remer told supervisor Emery that she thought Chisholm and the latter's mother, employee Opal Knapp, were the instigators of the union activity, but shortly thereafter Remer told Emery that she had found out who did start it, that it was Mary Hedstrom (R. 20-21; 113-114).

After lunch on October 1, Mrs. Remer told supervisor Emery that she wanted "to fire Sharon [Chisholm] that night and she had to have a legitimate reason for it" (R. 21; 114-115). Mrs. Remer then asked Emery "to pick a quarrel" with Chisholm and when Emery suggested that Chisholm might not quarrel back, Remer told her, "Well, needle her until she does. I want to fire her tonight" (R. 21; 115). At about 2 p.m. that afternoon, Chisholm was admittedly not at work when Mrs. Remer came up and asked if she was having "another break" (R. 16; 71). Chisholm answered "no" and Mrs. Remer said she thought Chisholm had better get back to work, which Chisholm did (R. 16-17; 71).

At closing time, Manager Remer discharged Chisholm and when asked the reason, answered, "Well, you've been talking too much to Mary Hedstrom . . . Also you talked back to Judy" (R. 14; 72). Chisholm asked Remer when the latter event had occurred and Remer replied, "Well, let me think . . . about two months ago" (R. 14; 72). At the hearing, Manager Remer testified that the only reason Chisholm "was discharged was because of a form of insubordination, in that she had been quite nasty to our floorlady, which is Judy Emery" (R. 22; 47-48). The first instance of insubordination, he testified, was "prob-

ably in August" and the second "came about two weeks after the first offense" (R. 22; 48).[8] On the other hand, President Remer gave as the cause of Chisholm's discharge the incident which had occurred a few hours earlier when she had found Chisholm not working, *supra*, p. 7. Chisholm, Remer said, had a cigarette and when she asked if Chisholm had nothing to do, the latter "looked" at her, "exhaled smoke" and answered "not particularly" (R. 16; 144-145).[9] Mrs. Remer admitted that Chisholm returned to work when told to do so (R. 144). Shortly thereafter, Mrs. Remer directed Manager Remer to discharge Chisholm (R. 16; 144).

Hedstrom was also discharged by Manager Remer at the close of work on October 1 (R. 14; 93). The reason, according to Remer, was "too many rejects" (R. 14; 93). Hedstrom protested that Remer knew "better than that," asked "if I had so many rejects, why wasn't I told about it?", and stated flatly that she did not believe she had had an excessive number (R. 93). "Are you real sure that this isn't because of union activities?" Hedstrom asked, but Remer said it was not (R. 93). "I think it is," Hedstrom insisted, "because . . . you did a real good

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[8] Emery testified that several weeks earlier she had complained to Manager Remer that Chisholm was "yelling" at her, and stated that one of them would have to go (R. 15; 103-104). Remer said he would talk to Chisholm, which he did, and Emery had no further trouble with Chisholm (R. 104).

[9] Smoking was permitted during working hours and Chisholm testified that she might have had a cigarette in the ashtray (R. 16; 77).

job . . . you got all the shop stewards out in one whack" (R. 93).[10]

According to respondent, President Remer ordered Hedstrom discharged when a tabulation made on September 30 revealed that she had an "excessive" number of rejects for defective work (R. 15; 145). It is undenied, however, that Hedstrom's work had not only never been criticized but she had been complimented for her good work on several occasions (R. 83, 92). The "tabulation" also showed "rejects" on days when Hedstrom worked in another department because of a burn on her hand (R. 18; 87-88, 60-61). For this and other reasons set forth fully, *infra*, pp. 17-19, the Board found that the Company's tabulation was not a "true and accurate" record of the "rejects" attributable to Hedstrom and her reject rate was not the cause of her discharge (R. 19).

II. The Board's conclusions of law and order

Upon the foregoing facts the Board concluded, as did the Trial Examiner, that respondent violated Section 8(a)(1) of the Act by circulating a petition for a company union, by threatening to move or close the plant if the Union succeeded in organizing the employees, and by granting a wage increase to induce the employees not to join the Union (R. 6, 33-34). It also found, in accordance with the Trial Examiner,

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[10] Hedstrom was referring to the fact that on October 1 the Company not only discharged herself and Chisholm, but also employees Knapp and Vieira, who were the assistant stewards (R. 12, 14; 93). Although charges were filed with respect to Knapp and Vieira, the complaint did not allege that their discharge violated the Act.

that respondent discharged employees Chisholm and Hedstrom because of their union activities in violation of Section 8(a)(3) and (1) of the Act (R. 6, 22, 33).

The Board's order directs respondents to cease and desist from the unfair labor practices found and in any other manner interfering with, restraining or coercing its employees in the exercise of their rights under the Act (R. 6-7). Affirmatively, the Board's order directs respondent to offer employees Chisholm and Hedstrom immediate reinstatement, to make them whole for any loss they may have suffered by reason of the discrimination against them and to post the usual appropriate notices (R. 7-8).

ARGUMENT

I. Substantial Evidence On the Record Considered As a Whole Supports the Board's Findings That Respondent Violated Section 8(a)(1) of the Act By Circulating a Petition for a Company Union, By Granting a Wage Increase To Discourage Union Activity, and By Threatening To Move or Close the Plant

Respondent does not appear to deny, as indeed it cannot, that Emery's circulation of a petition for a company union, with the Company's knowledge, violated the Act if Emery was a supervisor, as the Board found. The record, we submit, amply supports this finding.

Emery was the first adult employee hired (*infra* p. 26).[11] Her starting rate was $1.00 an hour, the

[11] Respondent's first employees were teenage students (*infra* p. 26).

rate for rank-and-file employees, but President Remer told her almost immediately that the hourly rate was "not for [her]" and she was being made "floorlady" and would receive $250 a month (R. 24; 100-101, *infra* p. 26). Mrs. Remer also told Emery that she was Mrs. Remer's "assistant and . . . was under management and * * * wouldn't be eligible" to vote in a Board election (R. 137).

Emery was referred to repeatedly as "floorlady" by Manager Remer and other witnesses (R. 47, 64, 67, 72, 83). Indeed, as noted *supra*, p. 7, Manager Remer testified that Chisholm was discharged for a "form of insubordination, in that she had been quite nasty to our floorlady . . . Emery." Emery was admittedly "in charge of quality control" and if an employee was found to have produced a substantial number of defective radios, "Judy would go to the girl" (R. 23-24; 143, *infra* p. 28). Employees took their complaints to her and she made reports on the employees to both Manager Remer and President Remer (R. 24; 143, *infra* p. 29). On occasion she recommended that employees be discharged, some of which recommendations were acted upon by the Company (R. 24; *infra* p. 29).[12]

In sum, the record amply supports the Board's finding that Emery was a supervisor; therefore, her

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[12] Respondent erred in stating in its brief to the Board that the only recommendation made by Emery was with respect to Chisholm (R. 102, *infra* p. 29). Its reliance upon the fact that her recommendation as to Chisholm was not accepted ignores the fact that Manager Remer talked to Chisholm about Emery's complaints and Chisholm gave Emery no further trouble (R. 103-104).

conduct in circulating the petition for a company union, with the Company's knowledge, was attributable to respondent.[13] The record also discloses, as the Board found, that Emery was regarded as a part of management by the employees (R. 43, 62), who would "reasonably assume" that she was acting with the "consent and approbation" of the Company when she solicited them to sign a petition for a company union (R. 24).[14] *International Association of Machinists* v. *N.L.R.B.*, 311 U.S. 72, 80; *N.L.R.B.* v. *Birmingham Publishing Company*, 262 F. 2d 2, 8 (C.A. 5); *N.L.R.B.* v. *San Diego Gas & Electric Co.*, 205 F. 2d 471, 475 (C.A. 9).

Similarly, the circumstances surrounding the wage increase granted by respondent a few days after the September 24 meeting fully warranted the Board's conclusion that respondent's purpose was to defeat the Union's organizational efforts. Thus, respondent was aware that its wage scale was low, and at least suspected that the employees' desire for higher wages was one of the reasons for their interest in union representation.[15] Moreover, the increase followed by

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[13] *N.L.R.B.* v. *Parma Water Lifter Co.*, 211 F. 2d 258, 262 (C.A. 9), certiorari denied, 348 U.S. 829; *N.L.R.B.* v. *Gate City Cotton Mills*, 167 F. 2d 647, 648 (C.A. 5).

[14] See, for example, the testimony of employee Nelson (R. 66), indicating that the rumor that Mrs. Remer was in favor of a company union "could have" resulted from the fact that "Mrs. Emery did bring back a piece of paper and ask us about the company union."

[15] For example, Nelson testified that when she discussed with Mrs. Remer the possibility of forming a company union, she told Remer that she did not think the employees

only a week the one granted on September 23, *supra*, p. 4. Mrs. Remer's explanation for the second increase in so short a period was that the first raise was negligible and hurriedly put into effect before the Company had received its financial statement (R. 26; 147-148). According to Mrs. Remer, the financial statement was received almost immediately thereafter and a second increase was given because the statement was "better" than anticipated (R. 27; 148). However, as the Board noted, Mrs. Remer was unable to state exactly when the financial statement was received; yet respondent offered no documentary corroboration of Mrs. Remer's uncertain recollection of when it was received (R. 27). Nor did Mrs. Remer offer any explanation for granting a hurried increase on September 23, when she was aware that a financial statement would be available shortly. Thus, there is ample record support for the Board's conclusion that the Union meeting on September 24 and wage increase on September 27 were not "unrelated", and that the Company's object in granting the increase was to thwart or discourage union activity by its employees. That its action therefore violated Section 8(a)(1) of the Act is well established. *Coca Cola Bottling Co. of St. Louis* v. *N.L.R.B.*, 195 F. 2d 955, 957 (C.A. 8); *N.L.R.B.* v. *Valley Broadcasting Co.*, 189 F. 2d 582, 586 (C.A. 6); *Parma Water Lifter Co.*, *supra*, 211 F. 2d 258, 262 (C.A. 9); see also

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would "go for it" because of the wage scale, and Mrs. Remer protested that the supposed union scale of $2 an hour was "awfully high" for a company "just starting out" (R. 28; 64-66).

N.L.R.B. v. *Idaho Egg Producers*, 229 F. 2d 821, 823 (C.A. 9).

It is likewise well settled that threats to close the plant or move it elsewhere, if the employees select a union as their bargaining representative, violate the Act.[16]

In sum, then, the record as a whole supports the Board's findings that respondent violated Section 8 (a) (1) of the Act by circulating a petition for a company union, by granting a wage increase to discourage union activity, and by threatening to move or close the plant if the employees selected the Union as their bargaining representative.

II. Substantial Evidence On the Record Considered As a Whole Supports the Board's Finding That Respondent Violated Section 8(a)(3) and (1) of the Act By Discharging Employees Chisholm and Hedstrom Because of Their Union Activities

As set forth *supra*, pp. 6-7, Chisholm's work was admittedly "excellent" and she and Hedstrom were two of the Company's top producers. Both, however, were openly active on behalf of the Union in the plant during breaks and, as supervisor Emery's testimony shows, Mrs. Remer at first believed that Chisholm was chiefly responsible for the union activity but later learned that Hedstrom was the "instigator" (R. 113). Chisholm and Hedstrom were the two employees elected union stewards at the September

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[16] *N.L.R.B.* v. *Howard-Cooper Corporation*, 259 F. 2d 558, 560 (C.A. 9); *N.L.R.B.* v. *Geigy Co.*, 211 F. 2d 553, 557 (C.A. 9); *N.L.R.B.* v. *West Coast Casket Co.*, 205 F. 2d 902, 904-905 (C.A. 9).

24 meeting, and employee Nelson testified that their names were "mentioned" when she and Mrs. Remer discussed the union meeting, although she was unable to recall "clearly" whether Mrs. Remer said she knew Chisholm and Hedstrom were "shop stewards—their names were in the conversation but I do not remember exactly in what way" (R. 20; 65).[17] In short, the record clearly discloses that the Company was well aware that Hedstrom and Chisholm were not only active on behalf of the Union, but that Mrs. Remer believed that they were the "instigators" of the organizational campaign. In addition, respondent regarded attendance at the union meeting as a "dirty trick" and sought to defeat the employees' efforts to obtain union representation by various illegal means including threats to close the plant or move to Japan if the campaign was successful.

Moreover, as demonstrated below, respondent's asserted reasons for discharging Chisholm and Hedstrom do not stand up under scrutiny, thereby adding further support to the Board's finding that Chisholm and Hedstrom were discharged because of their union activity. *N.L.R.B.* v. *Dant*, 207 F. 2d 165, 167 (C.A. 9).

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[17] Nelson, a witness for the General Counsel, had recently undergone an operation and the bill for about $350 had been paid by Mrs. Remer (R. 20, n. 6; 148-149). As the Examiner pointed out, Nelson was an "evasive and reluctant" witness who was obviously "not imparting any information she considered adverse to her employer and benefactor, if she could avoid it" (R. 19-20). See also the testimony of Stewart, Mrs. Remer's secretary, that she "might" have refused offers by two employees to furnish her lists of those attending the union meeting because she "already knew" and, as she said, "we didn't need" it (R. 13, n. 2; 154).

A. *Chisholm*

As set forth *supra*, p. 7, it is undisputed that only a few hours before Chisholm's discharge, Mrs. Remer told supervisor Emery that she wanted "to fire" Chisholm that night and wanted a legitimate reason for doing so. Mrs. Remer then asked Emery to "needle" Chisholm so that she would have a reason for discharging Chisholm,[18] and shortly thereafter Remer herself spoke to Chisholm about not being busy and Chisholm allegedly "exhaled smoke" and gave a flippant reply, *supra*, pp. 7-8. Mrs. Remer

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[18] In its brief to the Board, respondent vigorously attacked the Examiner's crediting of Emery, pointing out that he recognized that Emery, who was herself discharged after the events here in issue, may have been biased against respondent (R. 19). Furthermore, as noted by the Examiner, some of Emery's testimony supported respondent's contentions such as her frank admission that she had made complaints against Chisholm (R. 19; 103-104). In short, the Examiner concluded that although Emery "withheld nothing" she considered adverse to respondent's interests, it does not follow that she "substituted imagination for memory, invention for fact" (R. 21). Accordingly, the Board properly adopted the Examiner's crediting of Emery's testimony, the credibility of witnesses being primarily a question to be determined by the Examiner. *N.L.R.B.* v. *State Center Warehouse and Cold Storage Company*, 193 F. 2d 156, 157 (C.A. 9). Nor does the Examiner's crediting in general of the witnesses for the General Counsel and his discrediting of witnesses for respondent evidence bias on his part. *N.L.R.B.* v. *Pittsburgh Steamship Company*, 340 U.S. 498, 499-500. This is particularly true in this case in which substantial portions of the credited testimony are undenied and there are material contradictions in the testimony of respondent's own witnesses. It is also significant that the Examiner recommended that certain allegations of the complaint be dismissed and the Board agreed (R. 6, 25, 31-32).

thereupon ordered Manager Remer to discharge Chisholm for "insubordination." We submit that it would be difficult to believe that this incident, even as described by Mrs. Remer, constituted sufficiently serious "insubordination" to cause the discharge of an "excellent worker" and a top producer. In any event, it is clear that it was not the cause of Chisholm's discharge since Manager Remer, who actually discharged Chisholm, testified that the only reason for the action was that Chisholm had been "quite nasty" to floorlady Emery, *supra*, pp. 7-8. This had occurred, he conceded, at least two or three weeks, and perhaps nearly two months, earlier. Indeed, as the Board noted, Manager Remer's testimony fails to reveal that he even knew, at the time, of Mrs. Remer's conversation with Chisholm that afternoon, which was cited by Mrs. Remer as the cause of Chisholm's discharge (R. 22).

B. *Hedstrom*

According to respondent, Hedstrom was discharged when a tabulation was made which disclosed that she had an excessive rate of "rejects" for defective work. In concluding that Hedstrom was not discharged for this reason, the Board noted:

(1) *The timing and the nature of the tabulation.* According to Manager Remer, the tabulation was made only the day before Hedstrom's discharge, and such a tabulation was not a "normal procedure" but was done at Mrs. Remer's direction (R. 168). It was limited to work done between September 16 and

30 [19] and was further limited to the work of the four "top" employees because that would "give a better cross section" (R. 169-170).

(2) *The accuracy of the tabulation.* A number of facts cast doubt upon the accuracy of the tabulation. In the first place, it shows full production for Hedstrom for days on which, it is undenied, she was working in another department because of a bad burn on her hand (R. 18; 87-88, 60-61). In the second place, as the Board pointed out, some of the notations on the original slips were "in ink, some in pencil on the same slip, not always in the same handwriting, some of the figures were barely legible, and there were some erasures or 'marked over' figures, [and] none of the persons making the notations testified . . ." (R. 17; Respondent's Exhibit 2a-2d).

Furthermore, respondent conceded that rejects can and do at times result from defective parts (for which the employee is not responsible), as well as from poor work, and neither the slips nor the tabulation indicated the cause of the "rejects" (R. 17-18; 105, 160).

(3) *The evidence indicating that Hedstrom's work had been consistently good.* Hedstrom testified, without contradiction, that her work had never been criticized but had in fact been praised on several occasions, *supra* p. 9. Indeed, respondent itself does not assert that it had any cause for complaint about Hed-

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[19] Respondent's contention in its brief to the Board that the tabulation was limited to the past 2 weeks only because that was the period for which information was requested by the Board is refuted by the testimony of both of the Remers (R. 150-151, 159, 167-169, *infra* pp. 26-27).

strom's work prior to the tabulation and it is clear that, until it was made, the Company had no reason to believe that Hedstrom had an excessive rate of rejects. In fact, only a few days earlier Hedstrom received a promotion both in wage rate and job classification (R. 21-22; 80-82, 176-178). In addition, Emery testified that Hedstrom's reject rate was so low that when she did make a mistake it was considered a joke (R. 18; 105, 125). Although the Board recognized that not all of the rejects passed through Emery's hands, she was admittedly in charge of quality control and worked at the table at which the rejects were repaired (R. 18; 106-107, *infra* p. 28). In fact, Mrs. Remer testified that if the employees who did the testing found "5 or 6 [radios] that didn't play, they were alarmed and they would go to Judy and Judy would go to the girl" who had produced them (R. 143). As a result, Emery clearly had ample opportunity to observe the quality of the work and it was part of her duty to help employees avoid defective work (R. 18; *infra* p. 28).

On the basis of the foregoing facts, we submit that the Board could fairly conclude that the tabulation did not present an accurate record of Hedstrom's rejects due to poor work and that she was not discharged because of her reject rate (R. 19).

C. Summary

In view of all of the foregoing facts, including the Company's belief that Chisholm and Hedstrom were the "instigators" of the union campaign, its opposition to the Union and the failure of the explanations

for the discharges to stand up under scrutiny, the record as a whole fully supports both the Board's finding that, even if Chisholm was at times annoying and Hedstrom's reject rate was comparatively high, neither was discharged for the reason given, and its further finding that both were discharged instead because of their union activity in violation of Section 8(a)(3) and (1) of the Act.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the order in full as prayed in the Board's petition.

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JANUARY 1961.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

APPENDIX B

References to Exhibits pursuant to Rule 18(2)(f) of the Court
(Pages refer to printed record)

I. General Counsel's Exhibits

No.	Identified	Offered	Received in Evidence
1-e	6	8	9
1-g	7	8	9
1-m	7-8	8	9
3-a	48	50	50
3-b	48	50	50
3-c	48-49	50	50
4	53	53	53
5	56-57	57	57
7-a	173	178	179
7-b	173	178	179
7-c	173	178	179
7-d	173	178	179
7-e	173	178	179
7-f	173	178	179

II. Respondent's Exhibits

1	376-377	376-377	377

APPENDIX C

Additional portions of the transcript of testimony

Marlene Vieira, a witness for the General Counsel, testified as follows on cross-examination:

(p. 27)

Q. And I believe you said this morning it was Mary Hedstrom who asked you to come to the meeting?
A. Yes.
Q. What time of day was it when Mary asked you this?
A. It was on our break.

(p. 28)

Q. . . . this was in the plant, in the plant itself?
A. Yes.

James Hennings, a witness for the General Counsel, testified as follows on cross-examination:

(p. 85)

Q. Did Mrs. Remer ever say anything directly to you about not joining a union?
A. Yes, sir.

(p. 90)

Q. Wasn't one of her conversations with you to the effect that she knew you had been sent there for employment by the Machinists' Union?
A. No, sir.

* * * *

Q. That was true, though, wasn't it?
A. I was asked by Bill Stadnisky, who knew of a place but he wasn't sure if I could get on there, and he asked me if I would go out and try and tell him if there was anything wrong with the way they were hiring personnel.

(p. 91)

Q. But you did get on?
A. Yes, sir. I lied to get on.

Q. Yes?
A. I went back the next day and told Betty that somebody called me up to have me come out, and all I did was go out on my own and said somebody called me. And nobody sent me out there. I went out on my own.

Perri Nelson, a witness for the General Counsel, testified as follows on direct examination:

(p. 97)

Q. Go ahead.
A. So I told her that Mrs. Emery was very upset because she thought that Mrs. Remer thought that she was the one who had contacted the Machinists' Union in the first place . . . . Then I told her that I had heard that if the Machinists' Union did get into Hearever, that she would move the Company to Japan. She just laughed and said that was a ridiculous idea, that she hadn't said anything like that.

Cross-examination

(p. 116-117)

Q. And that meeting at Del's Cafe was the first contact you had had with the Machinists' Union people?
A. That is right.
Q. Who asked you to go over, do you recall?
A. I believe Mary Hedstrom told me there was going to be a meeting on our coffee break that morning.
Q. And did she ask any other people within your hearing?
A. I think . . . I don't remember who I was with, but I think she mentioned it to the people I was having coffee with.

(p. 118)

Q. (By Mr. Rhodes) When you were talking with Mrs. Remer right after that meeting at Del's Cafe . . . was that before or after the Del's Cafe meeting?

A. After.
Q. Was it rather close after that, right immediately after that?
A. I don't remember the exact date. Maybe a week.

(p. 120)

Q. A week or so, in there?
A. Yes.

* * * *

Q. You have already testified about her saying that it was absurd that she was going to close down and move to Japan, didn't you?
A. Yes sir.
Q. But that was a rumor in the plant?

(p. 122)

A. Yes, it was.

Sharon Chisholm, a witness for the General Counsel, testified on direct examination:

(p. 130)

Q. Did you attend any meeting of the Machinists' Union?
A. Yes.
Q. Do you recall the day that you attended that?
A. September 24th.

(p. 131)

Q. How were you informed of this meeting?
A. By Mary Hedstrom.

* * * *

Q. . . . Do you recall when it was she told you about the meeting?
A. It was in the morning. I think it was at break time.
Q. What day, what morning?
A. The same day of the meeting.

(p. 137)

Q. What activities, if any, did you engage in after this meeting, union activities?
A. Just passing out cards.
Q. Passing out what cards?
A. Union cards.

(p. 138)

Q. Where were you at the time?
A. Well, there was sometimes in the plant on our break, also over at the Boulevard Cafe . . . .

Betty Jayne Remer, a witness for respondent, testified on direct examination:

(p. 351)

Q. Do you recall, in general, the first crew which manufactured these things during the summer, July and August?
A. My first employees in my plant, other than Judy Emery and my secretary, were teenagers.
Q. These were children who were students at school, were they?
A. That is right.

(p. 356)

Q. While you were manufacturing that first little radio you were paying the wage scale in general of a dollar an hour, when you first began?
A. Right.

(p. 370)

Q. Did you make a tabulation from the original yellow tags of the rejects out of the total production of

Mary Hedstrom from September 16th through September 30th and of her total rejects during that period?

A. The count was made.

(p. 373)

Q. When did next anything come to your attention concerning union activities?

A. The next thing that happened was this date that has been established of September 24th, I believe, in the late afternoon, as I recall, when one of the girls came up to me and said "We are having a union meeting, Machinists' Union meeting, across the street at Del's Cafe, and we were asked to invite our employer." And I declined the invitation . . . .

Q. Did you stay around the plant then that afternoon?

A. I can't remember. I may have been there, I may not have been there. I just don't know. I thought I had my hair done that afternoon. I could be confused.

(p. 375)

Q. Were you standing at the window that day trying to determine who was going to Del's Cafe?

A. That would be pretty silly, when I had 8 feet of window, one side of my desk, from ceiling almost to floor length. I could see a small dog across the street.

(p. 382)

Q. Did you ever talk to anyone about closing the factory and moving it to Japan?

A. That is absurd.

(p. 384)

Q. Did you ever tell Judy Emery to needle or pick a fight with Sharon?

A. It's absolutely ridiculous. I certainly didn't.

Cross-examination

(p. 396-397)

Q. Do you recall that you had a conversation with Perri Nelson?

* * * *

A. That is right. She came by my desk and talked to me.
Q. This was after the meeting over at Del's Cafe?
A. I believe so.

* * * *

Q. Do you remember when it was in relation to the time that this bulletin was posted on your bulletin board?
A. These events are very, very close. It's a day here, a day there.

(p. 398)

Q. Well, just as a matter of fact, it was right after that meeting at Del's Cafe, wasn't it?
A. That wouldn't have any bearing on talking to her, would it?
Q. My question was: This was right after the meeting at Del's Cafe?
A. That is right, I presume it was.

(p. 405)

Q. Will you tell us what you told Bill with regard to discharging Sharon?
A. I told him to discharge her for insubordination.
Q. To you?
A. I didn't have to tell him who to.

(p. 407)

Q. My question is: Did you introduce her to your girls as "floorlady" or "foreman"?
A. I told them that Judy was in charge of quality control.

Louise Stewart, a witness for respondent, testified as follows on direct examination:

(p. 433)

Q. How long have you known Norma Emery?
A. Approximately 15 years.

* * * *

Q. Did Mrs. Emery come to you with complaints to pass on to Mrs. Remer?
A. At various times.

(p. 434)

Q. What employees did she complain about?
A. Well, various ones. Sharon, for one.

* * * *

Q. Did you pass the complaints on to Mrs. Remer?
A. I did.

Cross-examination

(p. 442-443)

Q. And you stated that Mrs. Emery complained to you about Sharon and others. Who were the others?
A. Well, there were several times on the night shift . . . I believe one of them was Helen Carmen, who later became Helen Desmuke.
Q. Were there others?
A. There were others . . . .
Q. Were these girls discharged?
A. I believe, I know that one or two of them were.

(p. 452-453)

Q. Do you know who attended the meeting at Del's Cafe?
A. I saw the employees go in the door, yes.

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No. 17042

United States Court of Appeals

for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

HEAREVER CO., INC.,

Respondent.

Transcript of Record

Petition for Enforcement of an Order of the National Labor Relations Board

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

Appearances:

JAMES S. JENSEN and
ROBERT MAGOR,
Attorneys, of the Staff of the 20th Region, National Labor Relations Board, Room 703,
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San Francisco, California,
appearing as counsel for the General Counsel.

JOHN J. KING,
Grand Lodge Representative,
306 Pacific Building,
610 Sixteenth Street,
Oakland 12, California,
appearing on behalf of the Charging Party and on behalf of Plato E. Papps, Chief Counsel, International Association of Machinists, 1300 Connecticut Avenue N. W.,
Washington 6, D. C.

QUARESMA & RHODES,
by
GENE RHODES and
FRED AVERA,
County Building Center,
Centerville, California,
appearing on behalf of Respondent.

GENERAL COUNSEL'S EXHIBIT 1-E

United States of America
Before the National Labor Relations Board

Case No. 20-CA-1341

HEAREVER CO., INC.

and

INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE NO. 115, AFL-CIO.

COMPLAINT AND NOTICE OF HEARING

* * * * *

I.

The charge was filed by the Union on October 22, 1957, and served by registered mail on Respondent on October 22, 1957; a first amended charge was filed by the Union on October 31, 1957, and served by registered mail on Respondent on October 31, 1957.

II.

Respondent is a California corporation with its principal office and place of business located at 6127 Castro Valley Blvd., Castro Valley, California, where it is engaged in the business of manufacture and sale of miniature crystal set radios with earphones. During the period from on or about July 6, 1957, when Respondent commenced operations, through and including September 1957, Respondent sold and shipped its products, by value in excess of $50,000, from its place of business at Castro Valley, California, to places and points located outside the State of California.

* * * * *

/s/ GERALD A. BROWN,
Regional Director,
National Labor Relations Board,
Twentieth Region,
630 Sansome Street,
San Francisco 11, California.

Admitted in Evidence March 25, 1958.

GENERAL COUNSEL'S EXHIBIT 1-G

[Title of Board and Cause.]

ANSWER

Comes now the Respondent Hearever Co. Inc. and in Answer to the Complaint filed herein by the Regional Director, National Labor Relations Board, 20th Region, admits, denies and alleges as follows:

I.

Answering paragraph III, Respondent is without knowledge as to the facts alleged therein, and placing his denial upon that basis, denies each and every, all and singular, generally and specifically the allegations contained therein.

II.

Answering paragraph IV in its entirety, and specifically answering sub-paragraphs A, B, C, D, and E thereof, denies each and every, all and singular, generally and specifically the allegations contained therein.

III.

Answering paragraph V, denies that Respondent discharged and refused and refuses the employees named therein because of any activities for and/or on behalf of the Union.

IV.

Answering paragraphs VI, VII, VIII and IX, denies each and every, all and singular, generally and specifically the allegations contained therein.

Wherefore, Respondent prays that the Complaint on file herein be dismissed.

HEAREVER CO. INC.
/s/ By BETTY JAYNE REMER
President
6127 Castro Valley Boulevard,
Castro Valley, California.

QUARESMA & RHODES
/s/ By FRED E. AMUA
Attorneys for Respondent.

Duly Verified.

Admitted in Evidence March 25, 1958.

[Title of Board and Cause.]

DECISION AND ORDER

On June 25, 1958, Trial Examiner William E. Spencer issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent had not engaged in certain unfair labor practices and recommended dismissal of allegations of the complaint concerning such practices. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, as amended, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.[1] The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[2]

Order

Upon the entire record in this case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Hearever Co., Inc., Castro Valley, California, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Granting wage or other benefits for the purpose of inducing or encouraging its employees to disavow or refrain from affiliating with International Association of

---

[1]Because of its disagreement with the Trial Examiner's findings and recommendations, the Respondent charges the Trial Examiner with bias and prejudice. We find no evidence in the record of any bias and prejudice and no merit in this contention. We further find no reason to disturb the Trial Examiner's credibility findings. Standard Dry Wall Products, Inc., 91 NLRB 544, enforced 188 F. 2d 362 (C. A. 3); cf. N.L.R.B. v. Universal Camera Corporation, 190 F. 2d 429 (C. A. 2), on remand from Universal Camera Corp. v. N.L.R.B., 340 U.S. 474.

[2]The Trial Examiner erroneously designated Emory's title as forelady instead of floorlady. However, correction of Emory's title in no way affects the validity of the Trial Examiner's conclusion that she held a supervisory position.

Machinists, District Lodge No. 115, AFL-CIO, or any other labor organizations;

(b) Threatening to move the situs of its operations in the event its employees choose to be represented by the above-named union or any other labor organization;

(c) Formulating and circulating among its employees a petition for a company or independent union, and soliciting signatures thereto;

(d) Discouraging membership in the above-named union or any other labor organization of its employees, by discharging its employees or by discriminating in any other manner in regard to their hire, or tenure of employment, or any term or condition of employment;

(e) In any other manner interfering with, restraining, or coercing its employees in the right to self-organization, to form labor organizations, to join or assist the above-named union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer Sharon Chisholm and Mary H. Hedstrom immediate and full reinstatement to their former or sub-

stantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of pay they may have suffered as a result of the discrimination against them, in the manner set forth in the section of the Intermediate Report entitled "The remedy";

(b) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social-security payment records, timecard personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the rights of employment under the terms of this Order;

(c) Post at its plant at Castro Valley, California, copies of the notice attached to the Intermediate Report and marked "Appendix."[3] Copies of said notice, to be furnished by the Regional Director for the Twentieth Region, San Francisco, California, shall, after being duly signed by a representative of the Respondent, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for a period of sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material;

[3]This notice is amended by substituting for the words, "The Recommendations of a Trial Examiner" the words "A Decision and Order." In the event that this Order is enforced by a decree of the United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

(d) Notify the Regional Director for the Twentieth Region, in writing, within ten (10) days from the date of this Order as to the steps the Respondent has taken to comply herewith.

It Is Further Ordered that the complaint, insofar as it alleges that the Respondent violated the Act in respects other than herein found, be, and it hereby is, dismissed.

Dated, Washington, D. C. November 25, 1958.

[Seal]

BOYD LEEDOM, Chairman
STEPHEN S. BEAN, Member
JOSEPH ALTON JENKINS, Member
National Labor Relations Board.

[Title of Board and Cause.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

The complaint herein alleges, in substance, that Hearever Co., Inc., hereinafter the Respondent or Hearever, discharged two of its employees because of their union activities, thereby violating Section 8 (a) (1) and (3) of the National Labor Relations Act, 61 Stat. 136, as amended, hereinafter the Act, and in independent violation of Section 8 (a) (1) of the Act, made certain statements and engaged in certain conduct described in detail below. On due notice a hearing before the undersigned Trial Examiner was held at San Francisco, California, on March 25, 26, 27, 1958. All parties were

represented and participated in the hearing. The jurisdictional allegations of the complaint were admitted, the allegations of unfair labor practices denied. Various motions of the Respondent to dismiss the complaint in whole or in part, upon which ruling was reserved at the close of the hearing, are disposed of by the findings and conclusions below.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. The business of the Respondent

Respondent is a California corporation with its principal office and place of business at Castro Valley, California, where it is engaged in the manufacture and sale of miniature crystal set radios and earphones. During the period from on or about July, 1957, when Respondent commenced operations at its Castro Valley plant, through and including September, 1957, Respondent sold and shipped products of a value in excess of $50,000 to places outside the State of California.

On these stipulated facts, jurisdiction is admitted and found.

II. The labor organization involved

International Association of Machinists, District Lodge No. 115, AFL-CIO, hereinafter the Union or Machinists, is a labor organization within the meaning of Section 2 (5) of the Act.

III. The unfair labor practices

A. Discrimination

During the period material to this proceeding, the Respondent in the production and sale of minature crystal-

set radios at its Castro Valley plant, employed some twenty to thirty persons, mostly females, among them Sharon Chisholm and Mary H. Hedstrom. Chisholm and Hedstrom are alleged to have been discriminatorily discharged on or about October 1, 1957. Respondent's president and active director of operations, was Betty Jayne Remer; its production manager, William A. Remer; its forelady in charge of quality control, Norma Emery.[1] Louise Stewart was secretary to Mrs. Remer, and also performed occasional secretarial services for Sales Manager Hewitt. Hewitt apparently spent little time at the plant and is not involved in the controversy which gave rise to this proceeding.

The Respondent began operations at its Castro Valley plant about July 1957. Mrs. Remer and her secretary, Stewart, occupied desks in the front of the plant building and the area occupied by them does not appear to have been more than partially enclosed during the period in question. Employees using the front entrance to the plant would be observable to Remer and Stewart as they came and went. There was a parking lot to the rear of the plant and presumably those employees who drove cars to and from work would enter and leave by a rear door.

About the middle of September, Mrs. Remer became aware of organizing activities when a representative of the Leather, Plastic & Novelty Workers Union, handed her a pamphlet in the parking lot to the rear of the plant. She requested the organizer not to hand out pamphlets on plant property. She later saw pamphlets of the same

[1]There is conflicting testimony on whether Emery bore the title "forelady", but the real issue is whether she was vested with supervisory functions of a degree which made the Respondent answerable for her conduct. This will be discussed hereinafter.

union inside the shop. On or about September 24, immediately after work hours, the Machinists held a meeting for Hearever employees in a cafe directly across the street from Respondent's plant. This meeting, conducted by Machinists representatives, was attended by a group of Hearever employees, including Chisholm and Hedstrom, and most of those attending the meeting appear to have signed authorization cards. (Some had also signed cards for the competing Novelty Workers Union.) At the suggestion of Machinists representatives, of the employees attending the meeting, two, by election, were designated shop stewards. These two were Chisholm and Hedstrom. According to the credited testimony of the two, they in turn designated two other employees, Opal Knapp, Chisholm's mother, and Marlene Vieira, to assist them in performing their functions as shop stewards.

There is some question whether Mrs. Remer actually observed Hearever employees as they crossed the street and entered the cafe directly across from the plant to attend the Machinists meeting. That she had advance knowledge of the meeting is admitted since she testified that one of the employees invited her to attend. She was uncertain, however, whether she was at her desk at closing time when employees attending the meeting and using the front entrance of the plant for exit would pass in unobstructed view of her desk, and I am inclined to think that she was not, since none of the employees attending the meeting who testified could recall with certainty seeing her as they left the plant. She did, however, return to her office after closing time, as indicated in the testimony of her secretary, Stewart. Forelady Emery testified that she saw Remer and Stewart standing at the window which fronted on the street and gave a clear view of anyone entering the cafe, and heard com-

ments exchanged such as "There go two more," and, "What a dirty trick." Remer denied this and testified that there would be no need for her to stand at the window which was to one side of her desk and reached from ceiling almost to the floor, when from her desk she could see a "small dog crossing the street." While I am convinced that Emery was mistaken in believing that she saw Remer in the latter's office at closing time, I am of the opinion that she did see her there shortly thereafter and that her testimony was substantially true, though whether Remer stood at the window or sat at her desk is immaterial, and in any event there is no doubt in my mind that Stewart observed and took note of employees crossing the street to attend the union meeting. The relationship between Stewart and Remer was such that it would be no more than reasonable to infer that Stewart imparted to her employer the results of her observation.[2]

[2]Stewart admitted that she "may" have refused the offers to two employees respectively to furnish her with lists of employees attending the meeting because she already knew who they were, and also admitted that on the afternoon the meeting occurred, after Mrs. Remer returned to her desk, they "may" have discussed the union meeting.

On or about the day following the September 24 meeting, Respondent's attorney and a member of its Board of Directors, at Mrs. Remer's invitation, came to the plant and addressed the employees on their rights to engage in, or to refrain from engaging in, union activities. A copy of this statement was posted in the plant. It is a communication clearly within the scope of Section 8 (c) of the Act, though the following paragraph has some relevancy as explanatory of a subsequent development:

You may form your own organization to secure what is commonly known as union benefits. If you do this you may set your own dues, initiation fees, and repre-

sent yourselves. If you do this the management can in no way dominate or control your organization and you can negotiate your wages and conditions with management just the same as if you were any other union.

On a date uncertain between the Machinists' meeting of September 24 and October 1, Emery, Respondent's forelady, went to Mrs. Remer and asked the latter's advice about forming a company union. According to Emery's credited testimony, Mrs. Remer in effect suggested the wording to serve as a text for a petition favoring a company union, and at Emery's request, Stewart, Remer's secretary, made up typed forms which Emery then circulated among the employees. The text contained an assurance that employees would not be discriminated against in refusing to sign the petition. Apparently none of the employees approached by Emery signed it. Admittedly, in the circulation of the petition, Emery made no representations that it was authorized or sponsored by Mrs. Remer.

On October 1, Production Manager Remer discharged Chisholm and Hedstrom. The reason given for Chisholm's discharge was insubordination. The high percentage of "rejects" in her assembling of radios, was the reason given Hedstrom for her discharge. On the same day it appears that Opal Knapp, Chisholm's mother, and another employee, Marlene Vieira, also were discharged, but it is not alleged that their discharges were unlawful.

Production Manager Remer testified that he supervised all production and personnel and was in charge of hiring and firing. His explanation of his action in discharging Chisholm for insubordination was that she had been "quite nasty" to her forelady, Emery. Emery, he testified, had come to him twice in tears because Chis-

holm had "sassed" her. This testimony was substantially corroborated by Emery. She testified that in August, after Chisholm had been impertinent to her, she recommended Chisholm's discharge to Remer and told him that one or the other of them had to go. Remer replied that he would talk to Chisholm. No further action was taken at the time. According to Remer, Emery's second complaint came in early September. He offered no explanation why the discharge was not then effectuated but was effectuated October 1.

As to Hedstrom, Remer testified that at Mrs. Remer's direction, he made a tabulation of "rejects" attributable to the four top production employees, all females, covering the period September 16-30, and this tabulation showed Hedstrom led the four in the number of rejects.[3] He also testified that Hedstrom talked too much but admitted that talk around the work tables during working hours was "tolerated," though he attempted to discourage it, and that all the employees talked from time to time and had been reprimanded because of it.

Mrs. Remer, who testified that she directed Production Manager Remer to discharge Chisholm and Hedstrom, gave a somewhat different version of Chisholm's

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[3]Both Chisholm and Hedstrom were engaged in the assembly of the constituent parts of the miniature radios, which included a certain amount of soldering. After assembly, the radios were tested for quality, and if they did not meet the standards they were returned to the assemblers as "rejects." Not all rejects were the fault of the assemblers, since some of the constituent parts might be defective, and, regardless of assembly, this would cause them to fail to meet the quality tests and they would be returned as rejects. While the radios were marked for identification of the assembler, and therefore the number of rejects attributable to each employee could be determined from the tabulation kept by Remer, these tabulations would not show whether the failure was due to defective parts or the manner in which they were assembled.

discharge. If her testimony is accepted, Chisholm's discharge was precipitated when Mrs. Remer found her at her mother's work table where she did not belong, and later saw Chisholm at the latter's own table idle and with a cigarette in her hand. According to Remer she asked Chisholm, "Don't you have anything to do?" whereupon Chisholm looked up at her, exhaled smoke in Remer's face, and said "Not particularly." Remer testified that there was a "tremendous air of defiance" in the plant that day and it had been reported that several employees, including Chisholm, had left for lunch prior to the scheduled time. At the end of the day, she testified, she directed Production Manager Remer to let Chisholm go. She further testified that it had been reported to her that Chisholm used vulgar language at her work table, and that on complaint of other employees, she had transferred Chisholm to another table. The incident of the transfer appears to have occurred about the middle of September.

Chisholm admitted that she used vulgar language on occasion but testified, with corroboration, that off-color jokes were indulged in generally around the work tables. She admitted that some two weeks prior to her discharge she was transferred to another work table, but it was her credited testimony that several other employees were transferred at the same time and that the move was explained by Production Manager Remer as an operational change. It is clear, and I find, that she was never reprimanded because of her use of ribald or vulgar language. She admitted that she had a lighted cigarette on her ashtray on October 1 when approached by Mrs. Remer, but denied that she exhaled smoke in the presence of the latter. Smoking was permitted at the work tables during working hours. She admitted that she was talk-

ing and that Remer admonished her to get back to work, but denied that she made the retort attributed to her by Remer. Chisholm, eighteen years of age at the time of her discharge, admittedly was one of Respondent's top producers and had a comparatively low percentage of rejects.

Hedstrom was also one of Respondent's top producers. The sole substantial reason advanced for her discharge was the alleged high rate of rejects. She doubtless also talked more at her work table than met with Respondent's approval but as Remer testified, talking was "tolerated" and there is no showing that Hedstrom excelled in garrulity. If Respondent's tabulations are credited, her ratio of rejects during the period covered by the tabulation—September 16-30—was substantially higher than that of the other three top producers.

I regard with some skepticism Respondent's tabulations, though they were buttressed by the original slips from which the tabulations were made.[4] Admittedly,

[4]These slips were purported to bear the original notations of the testers showing total daily production, the number of rejects, and designation of the individual assembler whose work was thus recorded. Some of the notations were in ink, some in pencil on the same slip, not always in the same handwriting, some of the figures were barely legible, and there were some erasures or "marked over" figures. None of the persons making the notations testified with respect to them.

there was a good deal of confusion in the plant during September and on occasion quantities of defective parts were intermixed with nondefective parts. Emery credibly testified that on an occasion good and defective earphones became mixed on several trays. Although the total of defective parts for the entire period may have been no more than one or two percent of the whole, this does not exclude the possibility of certain lots becoming so

intermixed at times as to raise an employee's ratio of rejects above normal and for reasons not attributable to the employee. As previously noted, a reject was charged to the employee through whose hands it passed in assembly, even though it was a reject because of defective parts, and Respondent's tabulations took no account of this. Further, a substantial doubt as to the accuracy of the tabulations is created by Hedstrom's credible and corroborated testimony that because of a burn on her hand suffered at noon, September 26, she worked as an assembler only a half day on that date, and not at all as an assembler on September 27, whereas Remer's tabulations attribute to her normal full-time production in assembly on both days.[5]

Accepting Remer's tabulations as accurate, it would be difficult to account for Emery's consistent and unshakeable testimony that Hedstrom's record for rejects was one of the lowest in the plant, so low in fact, that according to Emery, when Hedstrom did make a mistake in soldering it was considered a joke. True, the actual record of rejects did not pass through Emery's hands but were deposited with Remer, but admittedly Emery was in charge of quality control; rejects regularly came to her table; and while she did not personally handle all of them since that would have been a phsyical impossibility, it is hard to believe that with her opportunities for observation and her duties as forelady in charge of quality control, she would have been of the firm opinion that Hedstrom had fewer rejects due to faulty assembling than any other employee, if the fact was that Hedstrom had substantially the highest number of rejects among

[5]The daily production tabulations were posted in the plant but did not show the percentage of rejects.

the four top producers. Emery, discharged by the Respondent some months before testifying, may very well have been biased in her testimony, but she freely admitted her complaints with respect to Chisholm and that she sought Chisholm's discharge, and it is not shown that there was any particular bond of friendship between her and Hedstrom. I believe her testimony with respect to Hedstrom's work is entitled to weight and while I hesitate to characterize, and do not characterize Respondent's tabulation on Hedstrom's rejects as an outright fabrication, I am convinced that it does not present a true and accurate account of rejects attributable to Hedstrom. Assuming, however, contrary to these findings, a comparatively high ratio of rejects attributable to Hedstrom, there are other factors of a persuasive nature—both as to her and as to Chisholm—which cause me to question Respondent's bona fides in effectuating these discharges.

Both Mrs. Remer and her secretary, Stewart, while not denying knowledge that Chisholm and Hedstrom attended the September 24 meeting, did deny knowledge that they were union stewards. I am convinced, however, that Mrs. Remer was informed of their election as union stewards at the September 24 meeting and regarded them as the probable instigators of union activity in the plant. Employee Perri Nelson, a witness for the General Counsel but an evasive and reluctant one, who attended the Machinists meeting and there signed an authorization card, admitted that subsequent to the meeting she approached Remer and asked her if "she thought that it would be a good idea . . . if the plant turned Machinists' Union." According to her, Remer replied "that the only thing she could say about it was that $2 an hour was an awfully high wage when it was a company that was just starting out." Questioned, "Did

Mrs. Remer ask you who attended the meeting at Del's Cafe?", Nelson testified, "She didn't ask me. I thought she was probably aware of who attended, because it is directly across the street." She then denied that she told Remer who attended the meeting, but in answer to the question, "Were any names mentioned between you and Mrs. Remer as to who was at that meeting?" testified, "The names of Mary Hedstrom and Sharon Chisholm were mentioned, and I have been asked quite a bit about this, and I do not clearly remember whether Mrs. Remer said she knew that they were shop stewards—their names were in the conversation, but I do not remember exactly in what way." Remer, who testified that she was very much upset during this period, recalled the conversation with Nelson but little of its substance. She did not recall whether Chisholm and Hedstrom were mentioned. It was obvious that Nelson was not imparting any information she considered adverse to her employer and benefactor,[6] if she could avoid it, and her admission that Chisholm and Hedstrom were singled out for mention during this conversation and her failure of memory as to whether Remer said she knew they were shop stewards, invite something more than mere speculation.

On the same point, there is Emery's testimony, disputed by Remer, that in a telephone conversation Remer told her that an employee, Maudine Harbin, had given her the names of the shop stewards, and that she, Remer, had learned through this employee that Hedstrom

[6]While in Respondent's employ Nelson underwent an operation and Remer paid for it to an amount of about $350. That such an act of commendable generosity should meet with appreciation and a show of loyalty is but natural but nevertheless in weighing the witness' credibility such matters of necessity must be taken into account.

was the instigator of union activity in the plant.[7] Previously, according to Emery, Remer had told her that she believed that Chisholm and her mother, Opal Knapp, were the instigators. There is Emery's further testimony, also denied by Remer, that on the day of Chisholm's discharge, or the day preceding it, Remer told her that she wanted to discharge Chisholm but had to have a "legitimate" reason, and suggested to Emery that the latter pick a quarrel with Chisholm and, if necessary, "needle" her into making some retort which would serve as justification for the discharge. Though the probable bias of the witness, Emery, may be conceded, the position that she held at the time these alleged conversations occurred was such in relation to management, that Remer would feel no hesitancy in confiding in her as one sharing management's viewpoint, and her account of these conversations did not impress me as fabrications. I have no doubt she withheld nothing that she considered to be adverse to the interests of her former employer but it does not follow that she substituted imagination for memory, invention for fact, I credit her, and her testimony related to the circumstances attending the discharges, illuminates what otherwise would be puzzling and ambiguous.

Remer's sudden decision on September 30 to have her production manager make a tabulation of the rejects record on the four top producing employees, and the limitation of this survey to the brief period of September 16-30 and to just four employees, and the summary discharge of Hedstrom which followed, without a prior warning or reprimand or any indication that

[7]This information was probably correct. Hedstrom first engaged in organizing for the Novelty Workers, and then changed to the Machinists and was active in behalf of that union.

her work was unsatisfactory, is made doubly suspect by the fact that Hedstrom had been advanced both in wage and in job classification on September 27, and had previously received two wage increases. Chisholm's discharge based, according to Production Manager Remer, on her insubordinate conduct with respect to Emery—whom the Respondent now contends was a rank-and-file employee—occurring at least some two weeks prior to the discharge, but precipitated, according to Mrs. Remer, by insolence directed at Mrs. Remer on the day of the discharge, something which, apparently, Production Manager Remer was not aware of since he made no mention of it in his testimony, also finds its only logical explanation in the context of Emery's testimony.

The predominance of the material probative evidence, in my opinion, supports the General Counsel's position, and I accordingly find that the Respondent discharged Chisholm and Hedstrom because of their union activities, thereby discouraging membership in a labor organization, and interfering with, restraining and coercing its employees in the exercise of rights guaranteed them in Section 7 of the Act.[8]

B. Interference, Restraint, Coercion

1. Promotion of a company union

The complaint alleges in substance that Respondent promoted the formation of a company union in an effort to defeat the organizational activities of the Machinists.

[8]The Respondent, because it later signed a contract with the Novelty Workers Union, would have it inferred that it was not hostile to "outside" labor organizations, but it does not necessarily follow from the execution of this contract, which may or may not have represented substantial gains for the employees, that the Respondent was not vigorously opposed to the representation of its employees by the Machinists. I think there is no doubt that it was.

I have found that the statement read to Hearever employees by Respondent's attorney on the day following the September 24 meeting of the Machinists, and posted in the plant, was privileged free speech, and I do not find any other evidence of a material and probative character that the Respondent in an unlawful manner "solicited, promoted, and urged" employees to disavow the Machinists and to form an independent labor organization, other than the petition that was formulated by Emery in consultation with Mrs. Remer, typed by Stewart at Emery's request, and circulated by Emery.[9]

From Emery's testimony I infer that she sought out Remer and asked the latter's advice and that the latter did no more than suggest a text for the petition. The petition having been typed by Stewart, who occupied a desk in Remer's office, it may be inferred that Remer was aware of these services rendered Emery. There might still be some doubt, however, whether Remer's assistance in the formulation and preparation of the petition was violative of the Act, were it not for the position occupied by Emery. While Mrs. Remer denied that Emery bore the title forelady or had any supervisory functions, as previously noted Production Manager Remer testified that Chisholm was discharged because of insubordination with respect to Forelady Emery. Obviously, he regarded Emery's position as managerial in character for it would be anomalous indeed to charge

[9]I credit the testimony of Mary Preston, a former employee of Respondent, that in response to her inquiry about forming a company union, Remer expressed a preference for a company, over an "outside" union, and advised that employees would get the same benefits from a company union they would get from any other union, but do not find these remarks responsive to an inquiry, violative of the Act.

one rank-and-file employee with insubordinate conduct with respect to another rank-and-file employee. Further, it is clear that on occasion, though not often, he consulted Emery with respect to the production of individual employees and she would make reports to him. There were also consultations between Emery and Mrs. Remer of managerial character. Emery made recommendations for discharge and while they were not always followed they were on occasion effective, and the only reasonable assumption that can be made on the evidence is that her recommendations were accorded weight. Finally, though she was started on an hourly wage she was later placed on a salary basis. Withal, I am convinced that during the period in question she regarded herself and management regarded her as a managerial employee, and that the employees would reasonably assume when she solicited them to sign a petition for a company union, that she was acting with the consent and approbation of management. While under current decisions management may with impunity, I believe, express a preference for an independent or company union over a so-called "outside" organization, management's preparation and circulation of a petition for a company union, even though the petition is worded in a manner to give verbal reassurances to those who do not wish to sign it, is, I believe, a trespass upon employees' right to self-organization and violative of the act. Accordingly, I find that the Respondent prepared and circulated among its employees a petition for an independent or company union, and thereby interferred with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Interrogation of Employees

I find no substantial support in the evidence that the Respondent "interrogated and questioned" employees about their own union activities or those of other employees, and recommend dismissal of this allegation of the complaint.

3. Wage Increases

On or about September 27, 1957, the Respondent granted a wage increase to most of its employees, and this is alleged to have been done for the purpose of defeating organizational efforts of the Machinists. There is substantial support for this allegation. A wage increase following so closely on the heels of the Machinists' first organizational meeting, would in any event invite suspicion, and when that wage increase had been preceded by another general wage increase by no more than a week, such suspicions may very well ripen into a reasonable inference. There are other factors, however, to be considered. No statement, oral or otherwise, accompanied the September 27 increase to indicate an underlying purpose of persuading employees against union affiliation. And Respondent's business was a comparatively new one, in a comparatively or completely new field, where rapid growth might well be accompanied by frequent adjustments upward in the wage scale. The original starting rate for production employees was $1 an hour and in August this was raised 10 cents for some or most employees. A second raise, accompanied by a job classification of employees, occurred about September 23, shortly after Mrs. Remer was released from a hospital where she had been confined for a brief period. She explained this increase as resulting from a changeover from the production of premium (give-

away) radios of a "marginal" type of production, to models which Respondent would retail and which allowed for a greater margin of profit. According to her, the September 23 raises were overdue and hurried and somewhat negligible, being based on anticipation of higher profits rather than an exact accounting. Further according to her, after her return from the hospital and the release of the September 23 wage schedule, Respondent's accountant rendered a financial statement covering operations through August, which was better than she had anticipated and which justified a more generous increase than was reflected in the September 23 schedule. She thereupon put into effect the wage increase of September 27, and the new wage schedule and classifications were posted in the plant on September 30.

It is elementary that an employer is not barred from granting wage increases and other benefits because an organizational campaign is taking place. It is only where the granting of such benefits has as an object the thwarting of organizational objectives, that there is a trespass of employee rights under the Act. Benefits, in this connection, are viewed in the same light as penalties. Obviously, in such a situation as we have here, where the granting of wage benefits was not accompanied by statements which might afford a clue to motive, the ascertainment of motive is difficult. It may well be that absent any organizational activity, and in view of its expanding operations, the Respondent would have granted successive wage increases within a short period of time. However, the granting of two increases within a week of each other, each following closely on an organizational development of which

the Respondent had knowledge, viewed against the background of other conduct, such as the discharge of employees because of their activity on behalf of the Machinists, calls for something more persuasive by way of explanation than is found in the testimony of Mrs. Remer.

Admittedly, she first learned of organizational activities about September 15, and her testimony that the September 23 increase was hurried and negligible necessarily raises the question of why the Respondent acted so hurriedly and inadequately when it knew that its accountant was in the process of preparing a financial statement covering its operations through August—assuming, on Remer's testimony, that the statement was not actually rendered before the granting of the September 23 increase. On September 24, to Respondent's knowledge, the Machinists entered into the organizational picture. It is a reasonable assumption on the evidence, that this knowledge caused the Respondent a good deal more concern than was experienced when only one union, the Novelty Workers, was active among the employees, for it was on and after September 24, that the statements and conduct found herein to have constituted unfair labor practices, occurred. A second wage increase followed almost immediately.

Remer testified that this second wage increase was based on the financial statement covering the period through August but was unable to state with exactitude just when this statement was rendered, and the Respondent made no attempt to fix this date with certainty. There is therefore no corroboration, documentary or otherwise, of Remer's testimony that the statement came to her attention within the short period be-

tween the September 23 and September 27 increase, and I have been unable to give her testimony full credit on other matters relating to her conduct with respect to the organizational activities of her employees. While she testified in effect that she had no knowledge of the wage demands of the Machinists, in her discussion with Nelson—a witness favorably disposed toward the Respondent—during which Nelson sought her advice with respect to the Machinists, she spoke of how ruinous a $2 an hour rate of pay would be to a beginning company. I think we can assume, without strain, that with a wage rate as low as that paid by the Respondent at the start of organizational activities, a proposal for higher wages would be a cardinal point in any organizational campaign, and I have no doubt some hint or rumor—if not more—of such proposals had come to Remer's attention in the period preceding the granting of the September 27 increase. Under all the circumstances, I am unable to regard the second increase on September 27, and the organizational meeting of the Machinists on September 24, as unrelated, and must find, on the basis of what I believe to be a preponderance of the material and probative evidence, that in the granting of the September 27 increase the Respondent had as an object the thwarting of discouragement of activities among its employees on behalf of the Machinists.

4. The Threat to Move the Plant

Many of the constituent parts necessary to Respondent's assembly and sale of the miniature radios, were manufactured in Japan and imported for Respondent's use. This would be common knowledge among those engaged in the assembly of the radios. Emery testi-

fied that at some unspecified time, Mrs. Remer told her that a Mr. Browner "was in Japan looking over a factory. And she also made the statement that they could get their work done cheaper in Japan, because they had to ship the parts in here anyway, and they could assemble cheaper there." This testimony, not specifically denied, does not of course establish an explicit threat and in, in any event, there is no evidence that Emery repeated Remer's statement to rank-and-file employees. It does however, make more plausible than otherwise might be the case, the testimony of Employees James Henning and Mary Preston.

Henning, who was advised to seek employment with the Respondent by a Machinists' representative, who admittedly lied in getting employment with Respondent, and who worked for Respondent one month and quit, testified that at a time a representation election was pending,[10] Mrs. Remer told him that "if the Machinists' Union got in there she would have to close down, or that she could go to Japan and she could get the work done much cheaper, and that her parts were made there. She also stated she could go down the coast possibly and set up with cheaper labor."

Preston, discharged by Respondent at some time prior to testifying, testified that on an occasion when she sought Mrs. Remer's advice about forming a company union, she asked Remer if the latter intended to close the plant if the union came in, and that Remer replied in the affirmative. According to Preston, Remer said

[10]A Board election was scheduled in October but was indefinitely postponed when an unfair labor practice charge was filed. At a later date, on an RC petition, an election was held with the Machinists and Novelty Workers on the ballot. The latter won and the Respondent executed a contract with it.

she would have to have her work done elsewhere because she could not "afford" the union. She made no reference to the Machinists by name.

Perri Nelson, whose testimony in other matters has been alluded to, testified that on an occasion when she sought Mrs. Remer's advice because of her own confusion about organizational activities, she told Mrs. Remer she had heard that if the Machinists' Union "got into Hearever," Remer would move her operations to Japan, whereupon Remer laughed and said that was a ridiculous idea, that she had not said anything like that. This testimony is in accord with Remer's own testimony on the topic, quoted in its entirety:

Q. Did you ever talk to anyone about closing the factory and moving it to Japan?

A. That is absurd.

There is no doubt that Remer was deeply and understandably concerned and upset with two unions competing for the allegiance of her employees. I am convinced that her statement to Nelson, in reply to Nelson's inquiry concerning the Machinists, "that the only thing she could say about it was that $2 an hour was an awfully high wage when it was a company that was just starting out," was a direct reference to wage proposals being used by the Machinists in its organizational campaign. Her statement to Emery about cheaper operations in Japan, is indicative of a state of mind, and I am persuaded that in her conversations with Henning and Preston, respectively, she did suggest and indicate moving the situs of her operations as an alternative to union victory. Henning's testimony on a sum of money advanced by Remer to pay for transportation to the polls, discussed infra, was fully corroborated.

and through their versions of their conversation were in conflict, Remer admitted that Preston came to her seeking advice about forming a company union. The talk of moving the plant to Japan may indeed have been absurd, as Remer viewed it, but in view of the imports from Japan which went into the assembly of radios manufactured by her, it would not necessarily appear to be absurd to her employees, but to the contrary would represent a threat to their livelihood.

I find that by threatening to move the situs of operations in the event of a union victory, the Respondent interfered with, restrained and coerced its employees within the meaning of Section 8 (a) (1) of the Act.

5. Transportation to the Polls

Among Respondent's employees were a group of teenagers who worked only on Saturdays. When an election was scheduled, Mrs. Remer admittedly caused $10 to be offered this group to pay for their transportation to the polls, and when the election was indefinitely postponed the money was returned to her. There is no evidence that these employees were singled out because they were believed to be opposed to union representation or that any conditions whatever were attached to the free transportation thus offered them, or that the money was provided for anything but transportation to the polls. The Board has held that transportation of employees to the polls by car or bus by their employer, where this service was rendered without discrimination, did not constitute election interference.[11] There would be even less basis for holding it to be an unfair

[11] John S. Barnes Corporation, 90 NLRB 1358; R. H. Osbrink Manufacturing Company, 104 NLRB 42.

labor practice. I can see no material difference between providing the vehicles used in transporation and providing funds to pay for transportation, and there being no evidence that the offer of money solely for transportation had a discriminatory basis, I find that it did not constitute a violation of the Act.[12]

III. The effect of the unfair labor practices upon commerce.

The activities of the Respondent set forth in Section II above, occurring in connection with the operations of the Respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IV. The Remedy

Having found that the Respondent discharged Sharon Chisholm and Mary H. Hedstrom because of their union activities, I will recommend that the Respondent offer them immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of pay suffered because of the discrimination against them, by payment to each of a sum of money equal to what she normally would have been paid in Respondent's employ from the date of her discharge to the date of Respondent's offer of reinstatement, less her net earnings, if any, during said period. Loss of pay shall be computed

[12]It was not specifically pleaded as a violation but was fully litigated with the understanding that the General Counsel sought a finding that it constituted unlawful interference.

upon a quarterly basis in the manner established by the Board in F. W. Woolworth Company, 90 NLRB 289.

The Respondent's trespass upon employee rights under the Act, as disclosed by the entire evidence, is of such character and scope, that to make the remedy coextensive with the threat it will be recommended that the Respondent cease and desist from in any manner interfering with, restraining and coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

Conclusions of Law

1. Machinists is a labor organization within the meaning of Section 2(5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of its employees, Sharon Chisholm and Mary H. Hedstrom, thereby discouraging membership in the Machinists, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

3. By the aforesaid discharges and by circulating in its plant and by soliciting signatures to a petition for a company or independent union; threatening to move its operations in the event the Machinists succeeded in organizing its employees; and effectuating a wage increase with an object of inducing its employees to disavow or refrain from affiliation with the Machinists, the Respondent has interfered with, restrained and coerced its employees in the exercise of rights guaranteed

in Section 7 of the Act, thereby engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, it is recommended that Hearever Co., Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Granting wage or other benefits for the purpose of inducing or encouraging its employees to disavow or refrain from affiliation with Machinists, or any other labor organization;

(b) Threatening to move the situs of its operations in the event its employees choose to be represented by the Machinists or any other labor organization;

(c) Formulating and circulating among its employees a petition for a company or independent union, and soliciting signatures thereto;

(d) Discouraging membership in Machinists, or any other labor organization of its employees, by discharging its employees or by discriminating in any other manner in regard to their hire, or tenure of employment, or any term or condition of employment;

(e) In any other manner interfering with, restraining, or coercing its employees in the right to self-organization, to form labor organizations, to join or as-

sist the Machinists, or any other labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Sharon Chisholm and Mary H. Hedstrom immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of pay they may have suffered as a result of the discrimination against them, in the manner set forth above in the section entitled "The remedy";

(b) Upon request make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due under the terms of this recommended order;

(c) Post at its plant at Castro Valley, California, copies of the notice attached hereto as Appendix. Copies of said notice, to be furnished by the Regional Director for the Twentieth Region, San Francisco, California, shall, after being duly signed by a representative of the Respondent, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for a period of sixty (60) consecutive days thereafter, in

conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Twentieth Region, in writing, within twenty (20) days from the date of the receipt of this Intermediate Report and Recommended Order, what steps the Respondent has taken to comply herewith.

It is recommended that unless on or before twenty (20) days from the date of the receipt of this Intermediate Report and Recommended Order, the Respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondent to take the action aforesaid.

Dated this June 25 day of June 1958.

/s/ WILLIAM E. SPENCER
Trial Examiner.

APPENDIX

Notice to all employees pursuant to the recommendations of a trial examiner of the National Labor Relation's Board and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not induce or encourage our employees to disavow or refrain from membership in International Association of Machinists, District Lodge No. 115, AFL-CIO, or any other labor organization, by the granting of wage or other benefits; by threatening to

move the situs of our operations; or by the promulgation, circulation and solicitation of signatures to a petition for an independent or company union.

We Will Not discourage affiliation with the above-named or any other labor organization, by discharging our employees, or discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of employement.

We Will Not in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized by the National Labor Relations Act.

We Will offer Sharon Chisholm and Mary H. Hedstrom immediate and full reinstatement to the positions they formerly held, or their equivalent, without prejudice to seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered as a result of the discrimination against them.

HEAREVER CO., INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Before the National Labor Relations Board
Twentieth Region

Case No. 20-CA-1341

In the Matter of:

HEAREVER CO. INC.,

Respondent,

and

INTERNATIONAL ASSOCIATION OF MACHINISTS,

DISTRICT LODGE NO. 115, AFL-CIO,

Charging party.

Room 720 830 Market Street, San Francisco, California, Tuesday, March 25, 1958.

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock, a.m.

Before: William E. Spencer, Trial Examiner.

Appearances: James S. Jensen and Robert Magor, Attorneys, of the Staff of the 20th Region, National Labor Relations Board, Room 703, 830 Market Street, San Francisco, California, appearing as counsel for the General Counsel.

John J. King, 306 Pacific Building, 610 Sixteenth Street, Oakland 12, California, appearing on behalf of the charging Party and on behalf of Plato E. Papps, Chief Counsel, International Association of Machinists, 1300 Connecticut Avenue N. W., Washington 6, D.C.

Quaresma & Rhodes, by Gene Rhodes and Fred Avera, County Building Center, Centerville, California, appearing on behalf of the Respondent.

General Counsel's Exhibit No. 1-E is the complaint and notice of hearing, signed by Gerald A. Brown, Regional Director of the Twentieth Region, setting the date of hearing on the 25th day of February 1958 in Room 232, U.S. Appraisers Building in San Francisco;

* * * * *

General Counsel's Exhibit No. 1-G is the answer, signed by Betty Jayne Remer, and attached thereto is sworn statement by Betty Jayne Remer;

* * * * *

General Counsel's Exhibit No. 1-M is a letter to the International Association of Machinists, District Lodge No. [7] 115, AFL-CIO, from the Regional Director advising them that it does not appear that sufficient evidence of violation of Sections 8(a) (1) and (3) with respect to Marlene Vieira and Opal Knapp appeared and that the Regional Director was, therefore, refusing to issue a complaint on this aspect.

(Whereupon, the documents above referred to were marked General Counsel's Exhibits Nos. 1-A to 1-M, respectively, for identification.)

* * * * *

Mr. Jensen: I offer the exhibit file now and ask that the reporter mark them as I have identified them.

Trial Examiner: Do you have an objection, Mr. Rhodes?

Mr. Rhodes: No objection.

Trial Examiner: Do you have an objection, Mr. King?

Mr. King: No objection.

Trial Examiner: Received. [8]

(The documents heretofore respectively marked General Counsel's Exhibits Nos. 1-A to 1-M for identification were received in evidence.)

* * * * *

Mr. Jensen: I call the Trial Examiner's attention to the fact that paragraphs I and II of the complaint and notice of hearing are neither answered to nor mentioned in the answer and, therefore, under Rule Section 102.20, I move that they be deemed admitted.

Trial Examiner: You move that they be deemed admitted?

Mr. Jensen: Deemed admitted.

Trial Examiner: I presume that is the situation Mr. Rhodes, that you don't question the commerce allegations?

Mr. Rhodes: We will just stand on the answer, neither admitting nor denying.

Trial Examiner: You don't deny them, and that is tantamount to an admission, and so held.

* * * *

Mr. Jensen: I wonder if we might have a stipulation that the International Association of Machinists, District Lodge 115, AFL-CIO, is a labor organization within the meaning of the Act. We are prepared to prove it, but to save time [9] we will ask that it be stipulated.

Mr. King: We are prepared to so stipulate.

Trial Examiner: You will even admit it?

Mr. King: We will even admit it.

Mr. Rhodes: With such a damaging admission in the record, we will stipulate that it is a fact. [10]

* * * * *

MARLENE VIEIRA,

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows: [11]

* * * * *

Q. While you were employed who told you what to do or who supervised your work?

A. Judy Emery.

Q. What position, to your knowledge, did Judy Emery have with the company?

A. I guess you would call it a supervisor. [13]

* * * * *

Q. When was the last day on which you worked for the company? A. October 1st or 2nd. [14]

* * * * *

Q. Did you ever attend any meeting with the Machinists' Union at any time? A. Yes.

Q. Do you recall when that meeting took place?

A. It was either September 24th or 25th.

Q. Where did the meeting take place?

A. Del's Cafe.

Q. When you speak of Del's Cafe, where is that located?

A. Right across the street from Hearever.

Q. What is the name of the street?

A. Castro Valley Boulevard.

Q. Castro Valley Boulevard. When you say right across the [15] street, is it directly across the street?

A. Yes.

Q. How were you informed of that meeting?

A. I was notified at the plant.

Q. Do you recall who told you about it?

A. No. I was asked if I would go to the meeting.

(Testimony of Marlene Vieira.)

Q. Do you recall who asked you? A. Yes.

Q. Who? A. Mary Hedstrom.

* * * * *

Q. How did you leave the plant that evening?

A. Through the front door, across the street.

Q. What part of the plant faces on Castro Valley Boulevard? A. The front door. [16]

* * * * *

Q. What work is performed up in the front?

A. The office work.

Q. That is the office work? A. Yes.

Q. Who has their offices up there, to your knowledge?

A. Betty Remer, and the secretary, I guess. [17]

* * * * *

Q. Where was this meeting held, now, in Del's Cafe?

A. In the back room of Del's Cafe.

Q. Do you recall who else was there besides yourself? A. Just about all the employees. [18]

* * * * *

Q. Now, on the last day that you worked for the company, what was that, to the best of your recollection?

A. It was either a Monday or a Tuesday.

Q. Do you remember the date?

A. The 1st or 2nd of October.

Q. 1957? A. Yes.

Q. Did you have any occasion to see Judy Emery on that day? A. Yes.

Q. Will you tell us the circumstances under which you saw her?

A. She came back to the testing room and asked us

(Testimony of Marlene Vieira.)

if we would sign a piece of paper saying that we would form our own union. And I told her no, that I wasn't going to sign it, that I wouldn't sign it.

Q. What else was said?

A. Nobody else would sign it, either.

Q. Was anything else said by her?

A. And she said that nobody else has signed it, either and then she went back to the shipping room.

Q. You say, she came up to your testing table?

A. Yes. [23]

* * * * *

Cross-Examination

* * * * *

Q. And did I understand you to say it was Mr. Bill Remer who hired you for the job? A. Yes.

Q. Was he the person who explained your duties to you when you came to work?

A. No. He told me to see Judy.

Q. And is Judy the same person as Norma J. Emery?

A. Yes.

Q. And did you see Judy? A. Yes, I did.

Q. Did you have a conversation with her about what your duties were at that time? A. Yes. [25]

* * * * *

Q. On the day that you spoke of, that Mrs. Remer called a meeting of the workers in the plant, do you recall about what time of day that was?

A. Just before quitting time.

Q. And am I the lawyer who was present, whom you spoke of? A. Yes, you are.

(Testimony of Marlene Vieira.)

Q. Do you recall there were a few remarks made on that date—were there not?

A. I don't remember.

Q. Well, I did all the talking, didn't I?

A. Yes.

Q. Then, when I finished I asked if there were any questions and there were no questions; is that right?

A. Yes.

Q. Now, I want to read to you a statement—first, do you [32] recall whether I simply read a statement or not? Did I read from a paper?

A. I don't remember.

Q. I will read you a statement and ask you this, if you remember if this was substantially what was said:

> "Our company has been growing faster than what we anticipated, so we are now a much larger group than we were two months ago. As we grow we realize that there will probably be efforts made to organize us into a group. Before anything is done in this connection, you should know what your rights are:
>
> "(1) You have a right to join any union duly organized under the law. This empowers that union to be your sole representative and, in return, you pay initiation fees and dues. The management of this company does not discourage this and will in no way interfere with your right if you choose it;
>
> "(2) You have the right to refuse to join any union whatsoever. Failure to do so will not jeopardize your job;
>
> "(3) You may form your own organization to secure what is commonly known as union benefits.

(Testimony of Marlene Vieira.)

> If you do this, you may set your own dues, initiation fees and representatives yourselves. If you do this, the management can in no way dominate or control your organization and you can negotiate your wages and conditions with management just the same as [33] if you were in any other union.
>
> "Management only asks that you think this out for yourselves. We do not want to influence your choice in any way."

Was that the statement that I read that afternoon?

A. Yes.

Q. And then this statement was posted on the board?

A. That is right, yes. [34]

* * * * *

WILLIAM STADNISKY,

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Jensen): Would you state your name, please?

A. William Stadnisky.

Q. What is your position?

A. I am the district organizer for District 115, International Association of Machinists, AFL-CIO.

Q. And in your position, your job is to organize new plants that you hear about?

A. That is correct.

(Testimony of William Stadnisky.)

Q. And you are acquainted with the Hearever plant in Castro Valley?

A. I am.

Q. And did you participate in any activities towards [36] organizing that plant?

A. I did.

Q. And when did this commence?

A. On approximately September the 13th. I know it was on a Friday and almost two weeks prior to the date we held the meeting at Del's Cafe.

Q. This was in 1957?

A. 1957.

Q. You are the gentleman who called a meeting at Del's Cafe?

A. That is correct.

Q. And at this election/or at this meeting, was an election held?

A. An election was held to elect shop stewards or a shop committee, as I called it at that time.

Q. Those that participated or attended the meeting did the nominating and voting; is that correct?

A. That is correct.

Q. Do you know who were elected as shop stewards?

A. Yes. There was a Mary Hedstrom and Sharon Chisholm.

Q. What was the date of the meeting at Del's Cafe?

A. The 24th of September. [37]

* * * * *

WILLIAM A. REMER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. And you work for the Hearever Co.?

A. I do.

Q. And what is your position with the company?

A. Production manager. [43]

* * * * *

Q. Are you the individual who discharged Sharon Chisholm? A. Yes.

Q. Would you tell me the reason that you gave her a discharge?

A. Well, Sharon Chisholm was discharged because of a form of insubordination, in that she had been quite nasty to our floorlady, which is Judy Emery. And that was the reason for it.

Q. That was the only reason?

A. Yes, insubordination.

Q. That was the only reason, you say?

A. Yes. [44]

Trial Examiner: I think the last question you asked him was what reason did he give her. Did you want an answer to that?

Q. (By Mr. Jensen): For what reason did you discharge her? That was for insubordination to Mrs. Emery; is that right?

A. Yes.

Q. Is that the reason you have Mrs. Chisholm for her discharge?

A. To the best of my knowledge, I did.

(Testimony of William A. Remer.)

Q. And that was the only reason?

A. Yes.

Q. Can you recite the incidents of insubordination or insolence to Judy Emery?

A. Well, to the best of my knowledge, this began probably sometime in August or somewhere in there, when Judy Emery— I am not sure of the date now on this at all, but Judy Emery came to me in tears, where she had gotten some back talk from Sharon. That was the first time that that particular thing took place—this was the first time. She came to me a couple of times, and each time in tears.

Q. The first time was in August of 1957?

A. (No response.)

Q. I think that is what you just testified to.

A. It could have been, yes. As I said, I am not sure.

Q. And that was the only time, was it not? [45]

A. No. There were two instances, to my knowledge.

Q. When was the second incident?

A. That came about two weeks after the first offense.

Q. About two weeks after the first offense?

A. Yes.

Q. And the first time, to your best recollection, did this occur in the early part of August?

A. No, I don't think it would be the early part of August. I don't know. I just don't know.

Q. But on the second occasion, could that possibly have been in August, too?

A. No. That was in September.

(Testimony of William A. Remer.)

Q. It would have to be in the early part, however—is that not right? You said approximately two weeks after the first time.

A. About. Approximately two weeks after that.

Q. Are you the one who discharged Mary Hedstrom?

A. Yes.

Q. What was the reason that you discharged her?

A. Mary Hedstrom was discharged because of the high rate of rejects on her work.

Q. And was this the only reason she was discharged?

A. I would say that was the main reason. The other reason would be that there was a little bit too much talking going on.

Q. Did you receive complaints about her talking from anyone? [46]

A. No. Just from my own observation.

* * * * *

Q. Same room. And is talking, or at that time was talking, permitted by the production workers?

A. It was tolerated, yes.

Q. It was tolerated, with your knowledge, you knew that it was going on; is that right?

A. I tried to control it to the best of my ability, tried to control the talking.

Q. Did any of the other individuals talk?

A. Yes.

Q. Who?

A. They all talked from time to time.

* * * * *

Q. Do you know whether there was a wage increase around September 23, 1957?

(Testimony of William A. Remer.)

A. To the best of my knowledge, there was, and it was posted on the board as such. [47]

* * * * *

Q. Did you have any conversations with Betty Remer about unions?

A. Yes, sir.

Q. Can you tell me what was said?

A. Well—

Mr. Rhodes: First, may we establish about when the conversation occurred?

Mr. Jensen: I would like to have these marked for identification as General Counsel's Exhibit No. 3.

(The documents above-referred to were thereupon marked General Counsel's Exhibits Nos. 3-A, 3-B, 3-C, respectively, for identification.)

Q. (By Mr. Jensen): I hand you instruments marked as General Counsel's Exhibits for identification 3-A, 3-B and 3-C.

No. 3-A is dated September 23rd, 1957, headed "Subject: Classification & Production Wage Schedule—To: All Employees," which is over or bears the name of Hearever Co. Inc., B. J. Remer, President.

And Exhibit 3-B, which is dated the same date, entitled "Employee Wage Classification & Schedule. 3-C bears the same date, is entitled "Classification & Production Wage [48] Schedule," and at the bottom bears the name "Hearever Co. Inc.—B. J. Remer, President."

I ask you if these are the notices that were published.

A. They are.

Q. Would you examine them, please?

A. Yes, they are.

(Testimony of William A. Remer.)

Q. And these instruments show that on September 23rd a wage increase was granted to these individuals listed herein? A. Yes.

* * * * *

Q. (By Mr. Jensen): Can you tell me at this time approximately how many employees were employed at the plant?

Mr. Rhodes: This is on September 23rd, Mr. Jensen?

Mr. Jensen: That is correct.

Trial Examiner: Approximately.

A. Approximately 28.

Q. (By Mr. Jensen): That is including office personnel? A. 28 to 31, yes.

Q. Including office personnel; is that right?

A. Yes. [49]

Mr. Jensen: I would like to introduce these into evidence as General Counsel's Exhibits 3-A, B and C.

Mr. Rhodes: We have no objection.

* * * * *

Trial Examiner: Very well.

(The documents heretofore marked General Counsel's Exhibits Nos. 3-A, 3-B and 3-C, respectively, for identification, were received in evidence.) [50]

* * * * *

Q. (By Mr. Jensen): When these notices were published, they were published on a bulletin board, I imagine. Is that right? A. Yes, they were.

Q. And they note a classification for each individual on Page 2, or General Counsel's Exhibit 3-B; and then on 3-C, beside the job classification is the wage rate.

(Testimony of William A. Remer.)

Now, on September 23rd did this schedule reflect an increase in wages for the individuals listed herein?

A. It was supposed to have, yes. [51]

* * * * *

Mr. Jensen: We will stipulate to that if it's so desired.

Trial Examiner: That production is this company began on or about July 2nd, 1957; is that right?

Mr. Betty Jayne Remer: Yes.

Mr. Jensen: At Castro Valley; is that correct?

A. Yes.

Q. (By Mr. Jensen): On approximately September 30th of 1957 was another classification and wage production schedule published? A. Yes, it was. [52]

Q. Granting raises; is that correct? A. Yes.

Mr. Jensen: Would you mark this as General Counsel's Exhibit No. 4 for identification, please?

(Thereupon, the document above-referred to was marked General Counsel's Exhibit No. 4 for identification.)

Q. (By Mr. Jensen): I hand you an instrument dated September 30, 1957, which is entitled "Wage Raise Schedule (Effective September 27, 1957):" and ask you if this was the notice that was published on your bulletin board. A. Yes, it was.

Mr. Jensen: I would like to offer this in evidence as General Counsel's Exhibit No. 4.

Mr. Rhodes: I have no objection.

Trial Examiner: Received.

(The document heretofore marked General Counsel's Exhibit No. 4 for identification was received in evidence.) [53]

* * * * *

(Testimony of William A. Remer.)

Q. And what date was it that you discharged Mary Hedstrom and Sharon Chisholm?

A. That would be the 1st.

Q. October the 1st? A. Yes.

Mr. Jensen: I would like this marked for identification as General Counsel's Exhibit No. 5.

(Thereupon, the document above-referred to was marked General Counsel's Exhibit No. 5 for identification.)

Q. (By Mr. Jensen): I hand you instruments marked for identification as General Counsel's Exhibit No. 5, which are—are these the production records that were prepared under your direction?

A. Yes. Incidentally, the reason that you see the two is because this one wouldn't copy out. I was trying to make copies of it and this one, being blue, wouldn't go through that machine, and I recopied it, so we have two for the same day. These are one and the same.

Q. These are production records dated from September 16th through September 21st and from September 23rd through [56] September 30th?

A. Yes, that is correct.

Mr. Jensen: I offer these in evidence as General Counsel's Exhibit No. 5.

Trial Examiner: Do you have any objection?

Mr. Rhodes: No objection.

Trial Examiner: Received.

(The document hertofore marked General Counsel's Exhibit No. 5 for identification was received in evidence.)

Trial Examiner: I might ask you what you are putting these in for. What are you putting the production records in for? I would like to know because otherwise I might not even need to look at them.

Mr. Jensen: The purpose of this is to show the rate of production of employees that were discharged.

Trial Examiner: It is your contention that the production records will show an increased productivity on the part of these dischargees?

Mr. Jensen: It shows a high rate of production.

Trial Examiner: Comparative rate, too, I take it?

Mr. Jensen: One is the highest rate.

Trial Examiner: I see.

Mr. Jensen: Consistently. [57]

* * * * *

MARY PRESTON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. Are you working for Hearever Co. now?

A. No, I am not.

Q. Have you in the past? A. Yes. [58]

* * * * *

Q. Did you ever discuss unions with Betty Remer?

A. Yes, I did.

Q. When was this and what was the conversation that took place?

A. I met Mrs. Remer in the front doorway of the plant and I asked her if we could form our own company union and have the same benefits we would have from any other union.

(Testimony of Mary Preston.)

Q. And what did she reply?

A. She suggested we could and we would have the same benefits and she would like to see us do it rather than to go in with the union that the Frieden Company had.

Q. She said rather than go in with the union the Frieden Company had? A. Yes.

Q. Do you know what union it was?

A. The only union I knew of that had any activity out there at the time was the Plastic Union. I didn't know what union she was referring to. [60]

* * * * *

Q. (By Mr. Jensen): When was it that this conversation took place?

A. I don't remember what the date was, but it was the day the lawyers came in and talked to us about what our rights were regarding unions.

Q. And at a later date did you have another conversation with Mrs. Remer?

A. I asked her if she was going to close the plant if the unions came in and she told me yes.

Q. And when was this? A. I don't remember.

Q. As nearly as you can remember?

A. It was a few weeks, two or three weeks later. [61]

* * * * *

Q. Do you know where the parts that go to make up these radios come from? A. Yes, I do.

Q. And is Hearever Co.—where do they come from?

A. Most of them come from Japan.

* * * * *

Q. Was any mention made at any time about a company union?

(Testimony of Mary Preston.)

A. Only what—all I know of is what I talked with Mrs. Remer about.

Q. And who brought up that subject?

A. I did.

Q. And tell me as nearly as you can what you said and what she said. [62]

* * * * *

A. I asked her if we could form our own union and have the same benefits that we would have if we joined another union. She said yes, that we could have the same benefits, and that she would rather see us do that than to go in the union that Frieden Company had, and that she would have to close down the plant and send her work elsewhere if a union came into the plant, that she couldn't afford it.

Q. (By Mr. Jensen): Did she say where she would send her work elsewhere?

A. Where it had been done previously, at the place in Hayward.

Q. At the place what? A. In Hayward.

Q. Where was that?

A. Engineered Instruments.

* * * * *

Q. You worked as an assembler, is that correct, as a solderer? A. Part of the time.

Q. And part of the time as what?

A. I cased. And I also worked on repairs.

Q. And there were several of you who worked at a worktable at the same time? A. Yes.

Q. Was talking permitted? [63]

A. We talked. As long as it was kept down and kept

(Testimony of Mary Preston.)

quiet, it was permitted. If it got too noisy, we were told about it.

Q. Did everyone at the table talk?

A. Yes. [64]

* * * * *

Redirect Examination

[70]

* * * * *

Q. (By Mr. Jensen): Did you ever hear anyone else use vulgar and obscene language, or did you ever hear anyone? A. Yes.

Q. Who?

A. There was quite a bit of it at our table at the time.

Q. Who used it?

A. There was Perri Nelson and—

Q. And who else?

A. —and that is all. And Sharon and—there was this girl who had gotten married, her name was Georgia, I don't know her last name. [72]

* * * * *

JAMES HENNINGS,

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. When did you commence working for Hearever Co.?

A. Pardon me. When did I stop, did you mean?

(Testimony of James Hennings.)

Q. When did you commence, start, working?

Trial Examiner: About.

A. Late October or early November. I am not sure, sir.

Q. (By Mr. Jensen): 1957? A. Yes, sir.

Q. What job and rate of pay did you receive when you started?

A. I was shipping-receiving clerk. I started at a dollar twenty-five. [76]

* * * * *

Q. (By Mr. Jensen): Can you tell us when the conversation occurred, when it took place?

Trial Examiner: How long after you went to work was it that they took place, about? [78]

The Witness: Well, the third or fourth day after I went to work there they started.

Trial Examiner: All right, tell us what it was, who said what.

The Witness: Well, Mrs. Remer said if the Machinist Union got in there she would have to close down, or that she could go to Japan and she could get the work done much cheaper, and that her parts were made there. She also stated that she could go down the coast possibly and set up with cheaper labor.

* * * * *

Q. Where did the conversation take place?

A. It took place at her desk, before she moved into her private office.

Q. Now, there was an election scheduled to be held at the plant, was there?

A. Yes, sir. [79]

* * * * *

(Testimony of James Hennings.)

Q. Referring to the day that the election was originally scheduled, which was called off, do you remember anything in particular occurring that day involving Betty Remer?

A. Yes, sir. I had just about quitting time and it was almost time for the election, I had to go into the main office for something, I don't recall what it is now, and there was a bunch of people in there. I asked Mrs. Remer, "Aren't we going to have our election?" [80]

And she said, "No." And at that time there was quite a few young girls and high school kids that came over to vote, and she also told them that we were not going to have the election today. And one of the girls said, "Well, here is your $10 back." And it was the attorney's daughter.

Q. Do you know her name?

A. (No response.)

Q. Was it Barbara Avera?

A. Yes, sir, I believe that it was.

Q. Go ahead.

A. And Mrs. Remer said, "This was for taxi fare for some of the people that couldn't afford to come, to help for transportation." [81]

Q. Did you have any further conversation with Betty Remer regarding unions?

A. Well, she told me that she couldn't afford the Machinists' Union and the Leather & Plastic Workers' would give her a break.

Q. When did she tell you this?

A. Well, all these— we never talked at any time about the union after the first election was cancelled

(Testimony of James Hennings.)

all these talks, which I can't remember the date of— took place from about the third or fourth day that I worked there until the date of the scheduled election.

Q. Do you still work for the company?

A. No, sir.

Q. Were you discharged?

A. I quit, sir. [83]

* * * * *

IRA HARTWELL, JR.,

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. Have you worked in the past for Hearever Co.?

A. Yes, sir.

Q. When did you commence working? [91]

A. In the latter part of July, I believe. It would have been the first of September— or August.

Q. And what was your job?

A. For the first week or so Mr. Remer and I opened crates and prepared the back room for a shipping room.

Q. Were you working there in the latter part of September?

A. Yes, sir.

Q. In the shipping room?

A. Yes, sir.

Q. Are you acquainted with Mary Hedstrom?

A. Yes, sir.

Q. Did she she ever work with you?

A. Yes, sir.

(Testimony of Ira Hartwell, Jr.)

Q. What doing?

A. Sealing and packaging.

Q. Do you know why she worked back there with you?

A. Yes, sir. She had her thumb burned.

Q. Do you remember—

Mr. Rhodes: I beg your pardon. I don't believe we could hear the answer correctly.

The Witness: She had her thumb burned.

Mr. Rhodes: Oh, she had her thumb burned?

The Witness: Yes, sir. [92]

* * * * *

Q. And she was helping you?

A. Yes.

Q. Do you know when this was that she was back there with you?

A. Yes, sir. It was on a Thursday afternoon and Friday, all day Friday, and it was a week before she was discharged.

Q. That would be the afternoon of September 26th, Thursday, September 26th, and Friday all day, September 27th, 1957? A. Yes.

Q. Did she help you back there?

A. Yes, sir.

Q. And you saw her from time to time all day on the 27th and half a day on the 26th?

A. Yes, sir.

Q. Did you know about the union meeting to be held at Del's Cafe on September 24th?

A. Yes, sir.

(Testimony of Ira Hartwell, Jr.)

Q. Did you attend that meeting?

A. Yes, sir.

Q. Did you sign a union card?

A. Yes, sir.

Q. Who was your supervisor at the company?

A. Mr. Remer.

Q. Did anyone else supervise any of your work?

A. Well, only a day or two when I would work up front, and [93] then Judy Emery would supervise.

* * * * *

Q. Did you ever have a discussion with Judy Emery regarding unions?

A. No, sir. She brought a paper around for the people to sign who would like to form their own union.

Q. What did she say when she gave you this paper?

A. I don't know the exact words, but she said something to the effect that she didn't necessary want to bring it around, but she was requested to. She did not say who requested her to do so.

Q. Did you read the paper?

A. Yes, sir.

Q. Will you tell, as near as you can, what the paper said?

A. Well, just that the following, whoever signed it would like to form their own union within the company.

Q. Did you sign it?

A. No, sir. [94]

PERRI DENISE NELSON,

a witness called by and an behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. You are employed by Hearever Co.?

A. That is right.

Q. When did you commence working there?

A. Approximately July 23rd.

Q. 1957?

A. That is right. [95]

Q. What type of work were you hired to do?

A. Assembly work.

Q. Are you still doing assembly work?

A. No, I am not.

Q. What is your postition now?

A. I work in the office.

Q. What position in the office?

A. Receptionist.

Q. I call your attention to the meeting, Machinists' meeting, held in Del's Cafe on September 24, 1957, and ask you if you attended that meeting.

A. Yes, sir, I did.

Q. Did you sign a union authorization card?

A. Yes, I did.

Q. And a few days later did you discuss this meeting with Betty Remer?

A. Yes, I did.

Q. Where did this conversation take place and what was said?

(Testimony of Perri Denise Nelson.)

A. Well, I approached Mrs. Remer at her desk in the front office. I was very confused about what was going on. The whole factory was in an uproar. Everyone was upset. Mrs. Emery, whom I considered a friend of mine, the floorlady, was crying, and I didn't know anything about union and I just wanted to see if Mrs. Remer could explain what was happening to me. So I went to her desk, and the first thing when I asked her [96] what I wanted to discuss she told me she wasn't in a position to say anything, she would like to help me out but that she couldn't say too much. So I—do you want me to relate the whole conversation?

Q. Go ahead.

A. So I told her that Mrs. Emery was very upset because she thought that Mrs. Remer thought that she was the one who had contacted the Machinists' Union in the first place. And Mrs. Remer said she was sorry that Judy was upset but that everyone, everything was in an uproar. And then I asked her if she thought that it would be a good idea if the Machinists' Union, if the plant turned Machinists' Union. And she said that the only thing she could say about it was that $2 an hour was an awfuly high wage when it was a company that was just starting out.

* * * * *

Q. Did Mrs. Remer ask you who attended the meeting at Del's Cafe?

A. She didn't ask me. I thought she was probably aware of [97] who attended, because it is directly across the street.

* * * * *

(Testimony of Perri Denise Nelson.)

Trial Examiner: Did you tell Mrs. Remer who was at that meeting?

The Witness: No, I did not.

Trial Examiner: Were any names mentioned between you and Mrs. Remer as to who was at that meeting?

The Witness: The names Mary Hedstrom and Sharon Chisholm were mentioned, and I have been asked quite a bit about this, and I do not clearly remember whether Mrs. Remer said she knew that they were shop stewards —their names were in the conversation, but I do not remember exactly in that way. [98]

Q. (By Mr. Jensen): Have you recited all of the conversation that took place between you and Mrs. Remer at that time?

A. Something also was said about the colored help. I asked her, I had heard the rumor that she was going to, if the Machinists' Union got in, as it were, she was going to hire all colored help. And either she or I said that they [107] were loyal to her.

Q. She said what? Beg your pardon?

A. Either Mrs. Remer—there was something in the conversation about the colored people being the only ones that had been loyal to her. Now, I may have said it, because at the Machinists' union meeting in Del's Cafe the two colored girls that were employed did not attend the union meeting, or the—

Q. What was said by Mrs. Remer about a company union?

A. I asked her also—as has been said before, there was a lot of talk among the employees about which

(Testimony of Perri Denise Nelson.)

union should we join, and we had heard that Mrs. Remer was going to start a company union with all the benefits that we could receive from any other union—I asked her about it, and I also told her that I didn't think any of the employees would go for it because of the wage scale.

Q. When did you hear that Mrs. Remer was in favor of a company union?

A. I don't remember. I had—Mrs. Emery—I was working at the same testing table tht Marlene Vieira was, and Mrs. Emery did bring back a piece of paper and ask us about the company union. I do not remember her exact words, but it could have been from that and just everyone talking about it, because that was the main topic of conversation for a long time, in the plant. [108]

Q. Mrs. Emery had brought this piece of paper back about a company union?

A. Yes.

Q. And did you read it?

A. I don't remember reading it. I know I didn't sign it. I don't remember exactly what it said. It was just—

Q. Do you remember what she said at the time she brought it back?

A. To the best of my knowledge, she asked Marlene and I what we thought of a company union. And I don't remember what I said. I think both Marlene and I, neither one of us signed it or acted very interested in it at the time.

SHARON CHISHOLM,

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. Miss Chisholm, were you ever employed by Hearever Co.? A. Yes.

Q. Do you recall when you first went to work for the company?

A. August 6th.

Q. 1957?

A. Yes.

Q. What was your position with the company?

A. As an assembler. [125]

* * * * *

Q. Who supervised your work?

A. Judy Emery.

Q. What position, if any, to your knowledge, did Judy Emery have with the company?

A. Floorlady. [126]

* * * * *

Q. When was the next time that you got a raise after this one that you just related?

A. Maybe about three weeks afterwards.

Q. How did you learn about that raise?

A. It was posted on the bulletin board.

Q. Was this before you were discharged?

A. Yes.

Q. I show you what is in evidence as General Counsel's exhibit No. 3-B. A. Yes, that was it.

(Testimony of Sharon Chisholm.)

Q. Was this the notice that you referred to as posted on the bulletin board?

A. Yes.

Q. Now, the date it bears is September 23, 1957. Is that the date that you noticed it, or you recall?

A. I don't recall the date.

Q. I notice—

A. But I think that it was around, well, right in there.

Q. I notice it lists here "Chisholm, Sharon—Assembler Adv. C." And beyond that are the initials "S. C."; whose initials [128] are those? A. Mine.

Q. Did you put those on there? A. Yes.

Q. What job classification did you have before that?

A. Well, just assembler.

Q. How long were you assembler advanced C?

A. Let's see. Until the day—let's see—until I was terminated.

Q. Now, I notice on General Counsel's Exhibit No. 3-C in evidence it lists under "Advanced Assemblers" "Adv. Assemblers C," and it has a rate of $1.25. Was that your pay when you were terminated?

A. Yes; I got a nickel raise just before I was terminated. [129]

* * * * *

Q. Did you attend any meeting of the Machinists' Union? A. Yes.

Q. Do you recall the day that you attended that?

A. September 24th.

Q. 1957? A. Yes. [130]

* * * * *

(Testimony of Sharon Chisholm.)

Q. How were you informed of this meeting?

A. By Mary Hedstrom.

Q. And was she another employee or did she have some position with the company?

A. Yes, she was an employee. [131]

* * * * *

Q. When you got into Del's Cafe in the back room, who else was present?

A. Marlene Vieiera, Harold—something—I don't know his last name, Mary Hedstrom, Hank and Rita Hartwell—

Q. How do you spell their last name?

A. Hartwell?

Q. Yes.

A. H-a-r-t-w-e-l-l, I guess.

Q. All right. Who else was there?

A. Perri Nelson, Opal Knapp, Mary Frey, Evelyn Aroz, Oma—I don't know her last name, Billee—something. And that is all that I can think of right now.

Q. And all of these people that you have just named were all employees of the company?

A. All except Harold.

Q. Who is Harold? [133]

A. Marlene Vieiera's fiance.

Q. Were there any union representatives there?

A. Yes.

Q. Who were they?

A. Bill Stadnisky and Mel Thompson.

Q. Will you tell us, to the best of your recollection today, just what occurred at this meeting?

A. We arrived at the meeting, and Bill and Mel were late, and we waited for them about ten minutes

(Testimony of Sharon Chisholm.)

or so, and when they got there they introduced themselves, talked about the union benefits, hospitalization, and how much union dues were and how much it was if you were laid off. And that's about it. And then he asked, he said he had cards here for anybody who wanted to join the union to sign, and I was right next to him—Bill—and he handed me the cards and I passed them out to everyone and waited for them all to sign them, and then I handed them back in to Bill.

Q. When you refer to "Bill," who are you referring to?

A. Bill Stadnisky.

Q. Bill Stadnisky. And did you sign a card on that occasion, yourself?

A. Yes. [134]

Q. (By Mr. Magor): After you picked up these cards you gave them back to Bill Stadnisky; is that right? [135] A. Yes.

Q. What else occurred?

A. After that everybody left except Opal Knapp, Marlene Vierira, myself, Mary Hedstrom and the two union guys, Bill Stadnisky, Mel Thompson and—and we elected, we asked Marlene Vierira and Opal Knapp to help us as shop stewards.

Q. You asked them to help you as shop stewards?

A. Yes.

Q. Had you been appointed shop steward?

A. Yes.

Q. When did that take place?

A. That took place after I handed him the cards. I forgot to mention that. He said he wanted two shop stewards. Somebody said they wanted Mary Hedstrom

(Testimony of Sharon Chisholm.)

and everybody agreed by saying yes. Then somebody else said they wanted me and everybody said yes. So we were the shop stewardesses.

* * * * *

Q. You refer to, you said he wanted somebody to be shop stewards. Who are you referring to?

A. Bill Stadnisky.

Q. This was when the employees were there?

A. Yes. [136]

* * * * *

Q. And what was the last day on which you were employed by the company? A. October 1st.

Q. Did any incident occur on that day?

A. Yes.

Q. Tell us what happened.

A. Right after our 2:00 o'clock break, or 2:30—I can't remember which it was—I was talking to Mary Hedstrom, asking her if she was going to sign up for this demonstrating deal that was going on. And she said yes. And about that time Betty Remer came up in back of me, come around to the left side of me, and she asked me if I was having another break. And I said no. And she said, "Well, then I think you had better get back to work." And so she left, she went back into the back room and went back to work.

Q. What did you do then?

A. I went on back to work. [139]

Q. What occurred thereafter on that day, if anything? A. I was terminated.

Q. What time?

A. At the end of the shift, at 4:30.

(Testimony of Sharon Chisholm.)

Q. Will you explain to the Trial Examiner just what happened?

A. At 4:30 I went over to the sink to wash my hands and then I went in the back room to use the rest room. And on the way in there I met Marlene Vieiera and we were standing, talking, and Judy Emery came in, the floorlady, and said, "Bill Remer wants to talk to you at his desk." So right away we was wondering what it was, so we went right to his desk. And he said, "I want to see you one at a time."

So I thought well, I might as well go in and see what he wants to say. So I went first.

Q. Where was Marlene? Was she there at the time?

A. No. He made her go away.

Q. It was just you and Mr. Remer?

A. Bill Remer, yes.

Q. Anybody else present? A. No.

Q. Right beside you? A. No.

Q. Did you have a conversation at that time?

A. Yes.

Q. Will you tell us now just what was said and who said it? [140]

A. He said, "Sharon, I hate to do this, but I am going to have to let you go." And I said, "Oh?" I said, "Why?" And he said, "Well, you have been talking too much to Mary Hedstrom." And I said, "Oh?" And he said also, "Also you talked back to Judy, the floorlady." And I said, "Well, when was this?" And he said, "Well, let me think." And he thought awhile and though awhile, and he said, "About two months ago." And I said, "Two months ago?" And he said, "Yes." And I figured that

(Testimony of Sharon Chisholm.)

was it, so I just picked up my check and left—he handed my check to me and I left.

I waited for my mother, and then I left.

Q. Have you been back to the company since?

A. To picket.

Q. Did you picket?

A. Yes, I picketed the next day.

Q. The next day? A. Yes.

Q. Who else picketed besides you?

A. Mary Hedstrom, Opal Knapp, Marlene Vierira, and I can't remember any of the other ones. [141]

* * * * *

Q. In your testimony you mentioned an incident that Mr. Remer related with respect to talking back to the floorlady, Judy Emery. A. Yes.

Q. Had that ever occurred? A. Yes.

Q. When did it occur?

A. About a week after I was hired.

Q. Will you tell us the circumstances under which it occurred?

A. Well, when we were—when we finished a tray of radios we were to yell for everything we wanted. So when I wanted a tray I yelled, "Tray"—and no answer. I still waited for a tray and I couldn't put any more radios on that tray. So I yelled again "Tray," and no answer. And so finally the third time I yelled, "Tray" again and Judy came over and said, "I don't want you yelling at me any more." Just like that. And I said, "Well, I didn't yell at you," I said, "You didn't answer me." And then she said, "Well, let's just not [142] have it happen any more." So I just dropped it, left it go at that.

(Testimony of Sharon Chisholm.)

Q. When was this in relation—

A. About a week after I was hired.

Q. And that was all that was said between you and Judy? A. No.

Q. Did she ever at that time warn you that you would be discharged? A. No.

Q. Did she ever threaten discharge? A. No.

Q. Did you ever have any other disputes with Judy Emery at any time? A. No.

Q. On the day you last worked, the last day that you were working, did Betty Remer threaten to discharge you that day? A. No.

Q. Did she warn you that you would be discharged?

A. No.

Q. Had the employees—had you ever been warned that you were talking too much or told that you were talking too much? A. Yes.

Q. By whom?

A. By Judy. I mean, she just didn't come right out and say, "You have been talking too much." She said, "It's all right [143] if you talk, but you are to keep it down."

Q. When did that occur?

A. Oh, I don't know.

Q. I realize dates are hard to recall. In relation to the time that you were discharged, how long before?

A. Oh, I would say about three to four weeks.

Q. Now, tell us the circumstances under which that occurred. How Judy happen to come over?

A. We were telling jokes.

Q. Who was? A. Everybody at the table.

(Testimony of Sharon Chisholm.)

Q. Who was at the table?

A. Mary Hedstrom, myself, Judy Murphy, Maudine, Margaret Davis and Pauline Lee.

Q. Was this during working hours? A. Yes.

Q. And who told these jokes, do you recall?

A. No, I don't.

Q. What did Judy have to say when she came over?

A. She just said, "You girls are going to have to keep it down."

Q. Did she say, "You girls"? A. Yes.

Q. Did she use your name at all?

A. No, because all of us were laughing. [144]

* * * * *

Q. Were you ever advised by anybody in the company that you could talk on the job?

A. No. I was just told, it was just talked around that we could talk if we kept it low.

Q. Who told you that? A. Just hearsay.

Q. Just around the plant? A. Yes. [145]

* * * * *

Cross-Examination

[146]

* * * * *

Q. Didn't I understand you to say that, on raises, everybody seemed to get an automatic raise after they had been there about a month?

A. That was hearsay that I heard around. Nobody knew—I don't know. I just heard it from the employees. Not from Betty or Bill or Judy. [150]

* * * * *

(Testimony of Sharon Chisholm.)

Q. Is it your testimony, then, that you did tell dirty jokes, that you did swear occasionally, but so did Judy Murphy, so did Perri Nelson, so did Maudine, so did Mary Preston, so did Mary Hedstrom and so did Gail?

A. That is right.

Q. Every one of them? A. Yes.

Q. Now, that was at one table. Then you were moved to another table, weren't you? A. Yes.

Q. Why were you moved, Mrs. Chisholm? [156]

A. We were doing different work.

A. Oh, you were never moved, so far as you know, because you talked too much or caused trouble?

A. I was never told that. [157]

* * * * *

Q. When Mrs. Remer came through the plant this day and spoke to you, were you at your table or at your mother's table? A. I was at mine.

Q. At your table? [158] A. Yes.

Q. You were doing nothing?

A. I was working.

Q. What kind of work? A. Assembling.

Q. I see. Then why did Mrs. Remer ask you if you didn't have anything to do?

A. Because I was talking.

Q. Oh?

A. I was talking and working at the same time.

Q. You didn't find this difficult at all, did you?

A. No.

Q. In fact, you did it all the time and were still a very good worker?

A. Yes. I was tops in production.

(Testimony of Sharon Chisholm.)

Q. You smoked, too? A. Yes, I did.

Q. And you were smoking on this occasion, weren't you? A. Pardon me?

Q. You were smoking on this occasion, weren't you?

A. No, I wasn't. I might have had a cigarette in the ashtray.

Q. At any rate, you were capable of having a cigarette in the ashtray, talking and working all at the same time? A. Yes.

Q. When Mrs. Remer asked you if you had anything to do, didn't you say, "Well, not particularly"?

A. No, I didn't.

Q. You never made a statement like that?

A. No, I didn't.

Q. At any rate, you were capable of having a cigarette in the ashtray, talking and working all at the same time? A. Yes. [159]

Q. When Mrs. Remer asked you if you had anything to do, didn't you say, "Well, not particularly"?

A. No, I didn't

Q. You never made a statement like that?

A. No, I didn't. [160]

* * * * *

MARY HEDSTROM,

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

* * * * *

Direct Examination

Q. Mrs. Hedstrom, you formerly worked for Hearever Company? A. Yes.

(Testimony of Mary Hedstrom.)

Q. When did you commence working there?

A. I went to work July the 26th.

Q. And what job were you hired to do?

A. Assembler.

Q. At what rate of pay?

A. One dollar an hour.

Q. And did you work steadily up until the time of your discharge?

A. No, sir, I didn't. I worked one week and then I got word that my mother was passing away and I left. I was gone a month and then I came back to my job. On September the 4th I started again.

Q. September 4th. And who was your supervisor?

[171] A. Judy Emery.

Q. Mrs. Hedstrom, did you ever receive a raise when you were with the company?

A. Well, yes, sir, I did.

Q. When was this raise?

A. I guess I had been back about two weeks, and all the other girls were getting their dollar and ten cents, a ten-cent raise there, so I wondered why I hadn't gotten mine and I asked the secretary, I believe it was, and she told me to see Betty about it. Betty was very fair about this thing, so I seen Betty and she said, "Oh, haven't you received it yet?" And I said, "No." And I was taking that afternoon off, and she said to take my check back and have it remade over again; and I didn't have time for that. She said, "All right, let it go and we will make it retroactive back for the past week," which they did.

Q. Did you receive a raise at a later date?

A. Yes, sir.

(Testimony of Mary Hedstrom.)

Q. What date was that?

A. I believe it was the next week.

Q. I have here some slips. Will you tell me what these are? A. My checkstubs.

Q. Your checkstubs? A. Yes.

Q. Are these all of the checkstubs that you had when you worked [172] at the Hearever Company?

A. Yes, sir.

Mr. Jensen: I would like them marked for identification as General Counsel's Exhibit 7-A to 7-G.

(Thereupon, the documents above referred to were marked General Counsel's Exhibit Nos. 7-A to 7-G, respectively, for identification.)

Q. (By Mr. Jensen): Are these your paystubs?

A. Yes, sir.

Q. I note on here, Mrs. Hedstrom, that on the front of each stub is a notation "First paycheck—one day over," and so on. Were those made at the time you received the paychecks? A. Yes, sir.

Q. The ones on the front were? A. Yes.

Q. "Third paycheck," and so on? A. Yes.

Q. Now, there are notations on the back, I note, on General Counsel's Exhibit 7-A, which say "$1.00 per hour." Is that in your handwriting?

A. Yes, sir.

Q. And when was that placed on there?

A. I placed those on there as I got the checks.

Q. And on 7-B is also "$1.00 per hour." Was that placed on there at the same time? [173]

A. Yes; that was an extra day on that pay period.

(Testimony of Mary Hedstrom.)

Q. And 7-C shows another notation on the back, "$1.00 per hour."

The third paycheck, showing the period ending 9/12, shows that you worked 40 hours and received $40.00 pay, is that correct? A. Yes, sir.

Q. The General Counsel's Exhibit 7-E also shows for the period ending 9/20 you received $1.00 per hour?

A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. General Counsel's Exhibit 7-F, for the period ending 9/26, shows 36 hours worked, and in the earnings column, on the top, it shows "$4.00"; on the bottom, "$45.00." A. Yes, sir.

Q. Can you explain what your pay, your rate of pay, consisted of during that period of time?

A. Well, that was my, that $4.00 extra on there was retroactive back. That is what that was.

Q. Retroactive back at what rate of pay?

A. One dollar ten cents.

Q. One dollar ten cents. And the balance of the time was at what rate of pay?

A. Well, I asked for the dollar ten and when that check [174] came I had gotten another 15-cent raise with it, so that made it a dollar and a quarter.

Trial Examiner: What rate was that, now, when she got the 15-cent additional raise?

Q. (By Mr. Jensen): The 15-cent additional raise was on what date? The 23rd, was it?

A. I don't know how the pay periods run.

Trial Examiner: Well, you have the record here.

(Testimony of Mary Hedstrom.)

Q. (By Mr. Jensen): We have the record here. General Counsel's Exhibit 3-B shows your employee wage classification as what? A. Advanced Assembler C.

Q. And Advanced Assembler C on September 23rd received how much? A. Dollar and a quarter.

Mr. Jensen: Do you understand that now, Mr. Examiner?

Trial Examiner: Yes. As I understand it, she got the additional raise on September 23rd.

Mr. Jensen: That is right. That was her second raise.

Trial Examiner: Then did she get any more after that?

Q. (By Mr. Jensen): Then, on your pay slip designated as General Counsel's Exhibit No. 7-G, for the period ending 10/1, it shows you worked 24 hours and your pay was $31.20. Would you read the notation on the back, please? [175]

A. This notation here (indicating)?

Q. That is right.

A. "Got a five-cent raise September 30th, posted September 30th but paid $1.30 per hour as of September 27th."

Q. Was that notation made on the pay slip at the time that you tore it off when you cashed your check?

A. This?

Q. Yes. A. No; I wrote it on.

Q. I say, you wrote it on at that time, though?

A. Oh, yes. I thought you meant did the company write it on.

Q. Oh, no.

A. No. That is for my own record. You see, that

(Testimony of Mary Hedstrom.)

five cents extra raise was posted the day before I was discharged.

Mr. Jensen: I would like to offer these in evidence as General Counsel's 7-A through G.

Trial Examiner: You say you got the five cents increase right before you were discharged?

The Witness: The day I was discharged it was posted on the bulletin board, and I was raised from $1.25 to $1.30.

Trial Examiner: And you were disharged the next day?

The Witness: The next day.

Trial Examiner: When was that?

The Witness: October 1st. [176]

* * * * *

Trial Examiner: All right. Now, insofar as they are records corroborating her testimony as to wage increases, I will receive them.

Mr. Jensen: All right.

Trial Examiner: Insofar as they bear notations other than the matter of having received a wage increase, I will not consider that matter material and I do not receive it. Is that understood?

Mr. Jensen: That is understood and satisfactory.

Trial Examiner: Very well. [178]

* * * * *

(The documents heretofore marked General Counsel's Exhibits Nos. 7-A to 7-G, respectively, for identification were received in evidence.)

[179]

* * * * *

(Testimony of Mary Hedstrom.)

Q. Mrs. Hedstrom, did anyone at any time ever complain about your work?

A. No, sir.

Q. As to quality or quantity?

A. Well, I may have had—the floorlady may have had to bring back a few to me that I had soldered wrong. But insofar as I know, there wasn't any complaint about my work. Otherwise she would have brought it back to me, I presume.

Q. Were you ever commended on your work?

A. Yes, I was. I was commended by the floorlady—that's Judy Emery—and by three of the testers.

Q. And when were these compliments passed on to you? Do you remember?

A. Oh, I don't remember. I can't put exact dates on these compliments. At various times. [182]

* * * * *

Q. (By Mr. Jensen): Were you aware of a meeting that was held at Del's Cafe concerning the Machinists?

A. Yes, sir.

Q. On September 24th?

A. Yes, sir.

Q. And from whom did you find out about this meeting?

A. Gee, I don't know. I think I was notified by the union representative.

Q. Mr. Stadnisky?

A. Stadnisky, yes, sir.

Q. And did you notify other employees of the meeting? A. Yes.

(Testimony of Mary Hedstrom.)

Q. And you attended the meeting? [183]

A. Yes.

Q. And you were elected to an office at that meeting, is that right? A. Yes.

Q. Shop steward? A. Yes.

Q. And following the meeting did you engage in any type of union activity?

A. Yes, sir.

Q. When and what was it?

A. I passed out cards for the Machinists' Union.

Q. When was that?

A. Oh, at various times. But one time in particular I passed out cards, it had cards in it, it was also literature, stating what the union would offer us. It was, I believe, the Friday before I was discharged, I believe it was the Friday before.

Q. Friday before September 27th?

A. Yes.

Q. And will you tell—did anyone observe you at that time? A. Yes.

Q. Will you tell the Trial Examiner about that?

A. Well, I was out in the back—I went out to my car to get this literature after work and tried to pass it to the people as they came off work, and Bill Remer was standing at the back [184] door of the packing department—I guess that's what you would call it—he was standing back there and he seen me passing it out. When I seen him watching me, why, I stepped around the building to the side a little bit, not only so that he wouldn't observe so much, but also so that I would be able to catch everyone as they came out. I

(Testimony of Mary Hedstrom.)

was trying to get everyone. I knew I wasn't going to get them all because some of them went out the front door, and I was the only one that had that literature.

Q. Did he say anything to you at that time?

A. Who?

Q. Bill.

A. No, sir.

Q. Have you in your term of working for Hearever always done soldering?

A. No, sir. When I first went to work there it was soldering and casing. The complete unit.

Q. Soldering and casing?

A. Yes. And then when I came back and went to work again on September the 4th, why, it was still soldering and casing that we did. However, they were trying to figure out which would be a short method, the fastest method of getting them out, and then they changed over and some of the girls went to soldering, just soldering, and some went to casing. [185]

* * * * *

Q. You made reference to the date of September 20th a little while ago. Did you work that day?

A. I worked a half a day.

Q. A half a day?

A. Yes.

Q. And why did you not work the other half?

A. I had to go to town and see about my mother's insurance policy.

Q. And at that time you had been doing soldering?

A. Yes, sir.

(Testimony of Mary Hedstrom.)

Q. At any later date did you do a job other than soldering?

A. I did, yes, sir.

Q. And what was the reason for that?

A. Well, I burned my finger on the soldering iron pretty badly and I couldn't hang onto the wires.

Q. And what dates—when was this that you burned your hand, your thumb? [186]

A. It was the Thursday and Friday before the beginning of the next week when I was discharged, so it was the last Thursday and Friday that I worked.

Q. Was it September 26th that you burned your hand, which would be Thursday?

A. Yes. Right at noontime.

Q. And what work did you do at the company that day, the balance of the day?

A. Well, it was reported to Betty that I had burned my finger and she took me over to try to test, and I couldn't hear on the testing, so she took me back to the packing room and put me to sealing and packing the completed units.

Q. And how about on September 27th? Did you solder that day or did you—

A. No, sir. I worked in the back room all the next day, that half-day on Thursday and all day on Friday.

Q. And all day on Friday.

Trial Examiner: Was Friday the last day you worked?

The Witness: No. I went back to work on Monday, I worked Monday and Tuesday. Tuesday was when I was discharged.

(Testimony of Mary Hedstrom.)

Trial Examiner: Did you do any more soldering?

The Witness: Yes, sir. I had to go back to soldering on Monday.

Q. (By Mr. Jensen): I show you General Counsel's Exhibit No. 5, which is designated production records, and I show you [187] the production record dated September 26th, 1957, and ask you if this is the day that you burned your hand.

A. The Thursday?

Q. That is right. And I ask you if your name appears thereon.

A. Yes, sir.

Q. And it shows production beside your name?

A. It is this one here (indicating)? I can't tell.

Q. Three hundred fourteen coils.

A. Yes, sir.

Q. Did you produce those on that day?

A. Is that the day I worked a half a day?

Q. That is right.

A. I couldn't have produced that many in a half a day.

Q. I show you production record for September 27th, 1957. Does your name appear thereon?

A. Yes.

Q. And it shows that you produced 380 coils?

A. Yes.

Q. Is that true?

A. I don't see how it can be, because I didn't work that day on soldering.

Trial Examiner: Is it your testimony that it is not true?

The Witness: It is not.

(Testimony of Mary Hedstrom.)

Q. (By Mr. Jensen): It's not true, either one of those days? [188]

A. No, sir.

Trial Examiner: You are sure of those dates, are you?

The Witness: Yes. I burned my thumb, so I am pretty sure of those dates. I burned it real good.

Q. (By Mr. Jensen): Do you have any way of tying in those days with any other incident that occurred that day, say, the 27th?

A. That is the day that I went out to the car and passed the literature out in the back yard.

Q. And you specifically tie those two together?

A. Yes.

Q. Did you work on Septemebr 30th, which would have been the following Monday?

A. Yes.

Q. And you soldered? A. Yes.

Q. Were you notified of any rejects that day?

A. No, sir.

Q. None at all?

A. No, sir. The 30th?

Q. The Monday, the day before you were discharged.

A. No, sir.

Q. Do you want a calendar? Would you like to see one?

A. Yes; it might help.

Q. Here's the day you were discharged (indicating). [189]

A. That's a Tuesday.

(Testimony of Mary Hedstrom.)

Q. I am referring to Monday, the day before you were discharged.

A. I do not recall of being told of any bad ones or rejects. [190]

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Q. (By Mr. Jensen): Mrs. Hedstrom, I think I asked you to describe the parts that were used in the soldering process.

A. Well, it consists of a coil, an earphone, alligator clip and a crystal. And these were to be attached to the coil with little drops of solder.

Q. And that was your job?

A. Yes.

Q. To attach the—?

A. Get them in the right places.

Q. Do you know where these parts were obtained from or produced, do you have knowledge of that, the earphones and the coils?

A. I understand they were from Japan, but I couldn't swear to that.

Q. Do you know whether these parts were tested before they were delivered to the solderers?

A. Well, there were times when the crystals were tested, I know, because they had a boy there who did test crystals sometimes. Now, whether they were all tested or not I couldn't say. I mean I wouldn't know whether they were all right or not when I got the part to work with it.

Q. You didn't know, then, whether an earphone or a crystal or a coil was in proper working order at the time you received [194] it?

(Testimony of Mary Hedstrom.)

A. No, sir. I had no way of knowing that.

Q. And when you picked it up and started to solder it together, would you know whether it was a good part or a defective part?

A. No, sir. The only way that could be told was after it was together and tested.

Q. And after it was together it went to someone else, did it, and was tested?

A. Yes. It went to someone else and had the case put on it, and then they were tested, I believe. For awhile there maybe they tested them without the cases first.

Q. And there were rejects, everyone had rejects, is that right, from time to time?

A. Well, I believe everyone had some rejects, yes.

Q. And were you notified—

A. They couldn't help it.

Q. Were you notified of the rejects?

A. I was notified of some. A few.

Q. How many, would you say?

Trial Examiner: You mean during her entire period of employment?

Mr. Jensen: Well, over—

A. The floorlady brought back four or five rejects to me that were maybe wired wrong or something. But many times I had the floorlady, Mrs. Emery, or Bill Remer come and take my [195] entire box of earphones away or my crystals away because they had been testing my work, and they were running back, so they found out it was either the earphones or the crystals, so they came back and took them away and brought me other crystals or other earphones.

(Testimony of Mary Hedstrom.)

Q. Within, say, during the month of September, would you estimate how many rejects you had, could you tell us how many rejects you had for faulty wiring?

A. Well, I would have no way of knowing; only what was brought back to me.

Q. Was it the custom to return units which were wired faultily to the individual who had done the soldering? Do you follow that?

A. Would you restate that again?

Q. Was it the custom, when a unit had been rejected for faulty wiring, to return that unit to the individual who had wired it? A. Yes.

Q. And during the month of September were some returned to you for that reason?

A. Yes. I had five or six of them.

Q. Five or six? A. Yes. [196]

* * * * *

Q. How many worked at the same table you worked at? A. Six of us.

Q. Did some of them also receive work back which was for bad soldering? A. Yes.

Q. As many as six apiece?

A. Well, one girl received a lot more than six back, and she was told about a lot more that didn't even come back; the floorlady just got disgusted bringing them back, telling them about it, telling her about it, because she was invariably wiring them backwards. Why, the only reason I can say is that there were some coils that came in already set up backwards, and we were told at one time to go ahead and change the wires around and wire them backwards. But when you are trying

(Testimony of Mary Hedstrom.)

to make production you can't fool around with that. You get used to doing things one way and that is the way you do it in order to make production. When you turn around and try to do it the other way, it does slow your production down. So whenever I would come to a coil that was already wired wrong, the coil, I would put it over in a reject box, because that did slow production down. However, I did get ahold of a few of them and wire them backwards. [197]

Q. Were you discharged on October 1st?

A. Yes.

Q. And—

Trial Examiner: Just a minute. What was the name of the employee who had so many rejects that you just testified about?

The Witness: Pauline Lee.

* * * * *

Q. (By Mr. Jensen): Is Pauline Lee, within your knowledge, still with the company? A. Yes, sir.

Q. You do know she is? A. Yes, sir.

Q. You were discharged on—

A. Pardon me. I understand her name is Pauline Sims now. I don't know, she evidently got married.

Q. You were discharged on October 1st?

A. Yes, sir.

Q. And who discharged you?

A. Bill Remer.

Q. What reason was given?

A. Too many rejects.

Q. And had he ever criticized your work before?

A. No, sir.

(Testimony of Mary Hedstrom.)

Q. Did you have a conversation with Mr. Remer at that time? A. Yes, sir.

Q. What was that conversation? [198]

A. Well, the other girls who had been fired come by and told me, for various reasons, and I was quite sure that their reasons weren't the same as what mine was going to be, because I didn't make a habit of talking on the job. So I wanted to know, find out what it was, so I went to Bill and I said, "Well, what is the reason for me, Bill?" And he says, "Too many rejects."

Q. What did you say?

A. I said, "Oh, come on, Bill", I said. "You know better than that." I said, "If I had so many rejects, why wasn't I told about it? Don't you have a floorlady?" I said, "Isn't that her job, to tell me?" Well, he said he had them and I said, "I don't believe it." I said, "Are you real sure that this isn't because of union activities?" "Oh, no, no." And I said, "Well, I think it is, because", I said, "you did a real good job", I said, "You got all the shop stewards out in one whack."

Q. Who else was discharged the same day you were? Do you know?

A. Sharon Chisholm, Marlene Vierira and Opal Knapp.

Q. And Marlene Vierira and Opal Knapp were the two assistant shop stewardesses?

A. They were the stewards we appointed ourselves.

Q. The gentleman who discharged you, was this the same man who saw you passing out the notices of the union meeting on September 27? [199]

A. Yes, sir.

(Testimony of Mary Hedstrom.)

Trial Examiner: Was anybody else discharged, besides the four that you have named, including yourself?

The Witness: Just the four of us that day.

* * * * *

Q. (By Mr. Jensen): You are acquainted with Sharon Chisholm and worked with her, did you not?

A. Yes, sir.

Q. Did she talk at the table, at your work table?

A. We all talked.

Q. You all talked. Did Sharon talk more than anyone else? A. No, sir. [201]

* * * * *

Q. Have you been offered your job back with the Hearever Company? A. Have I?

Q. Yes. A. You mean since my discharge?

Q. That is right? A. No, sir.

* * * * *

Cross-Examination

Q. (By Mr. Rhodes): Mrs. Hedstrom, this meeting that occurred [202] in Del's Cafe was attended by how many people? A. Almost the entire plant.

Q. Can you name the people that were there?

A. I couldn't name all of them. I know I couldn't remember all their names.

Q. You heard Sharon Chisholm yesterday enumerate all the names. Were those the people that were there, as you remember? A. Yes.

Q. You were elected at that time, were you not?

A. Yes, sir.

Q. And I understand that you were at this time elected shop steward, although you were the same person

(Testimony of Mary Hedstrom.)

who had originally been recruiting for the Plastic Workers' Union? A. Yes, sir.

Q. Had you been elected a steward for the Plastic Workers' Union before that? A. No, sir.

Q. Had they had an organizational meeting before that time?

A. No, sir. There was confusion, some confusion there. After I had talked—is it all right if I explain this?

Q. Let me ask you the questions and then, if I leave anything out, you explain it. A. Oh.

Q. About when did you begin to pass out these cards for the Plastic Workers' Union? [203]

A. It was approximately around the 20th—no, it had to be before that. It was around the middle of the month. About the 17th, I believe.

Q. Around the middle of September, then, you were giving the various workers in the plant organizational cards or applications for membership in the Plastic Workers' Union. And was this on your own time? I assume it was. A. Yes.

Q. This was all after work and at breaks, and so on?

A. Yes.

Q. And you had no union activity whatsoever during the working hours? A. No.

Q. You were very careful to watch that, weren't you?

A. Yes.

Q. And then you didn't even talk about any of these things with the girls that you were standing right next to and working all day with, did you? A. No, sir.

Q. As I understand it, you were fairly crowded at these tables and you would be standing perhaps as close

(Testimony of Mary Hedstrom.)

to the next person as I am sitting to Mrs. Remer here at the table?

A. Well, I worked on the end of the table.

Q. I see. But you were still within arm's reach of people right next to you. [204] A. Oh, yes.

Q. You did converse all the time?

A. What do you mean, converse all the time?

Q. You talked back and forth all the time?

A. Not all the time.

Q. There is some misunderstanding over that. I believe you said that when you went to see Mr. Remer about your discharge that you hadn't been talking.

A. Not to excess.

Q. But you said just a minute ago, "We all talked," that you all talked, that you talked just as much as Sharon Chisholm did.

A. Oh, I don't know whether I talked just as much as she did, I don't know as I talked just as much as she did, but at any rate, we weren't told we couldn't talk. [205]

* * * * *

Q. Your only concern was that you wanted to be in the proper union and when you found out you were in the wrong camp you changed over?

A. That is right.

Q. Your activities for the Machinists' Union started about when?

A. About the middle of the month. That is when I got all tangled up.

Q. At some stage you must have quit organizing for Plastics Workers and started organizing for the Machinists. About when did that change come about?

(Testimony of Mary Hedstrom.)

A. That was around the 20th, somewhere around there.

Q. Around the 20th. And then these girls—I think you have heard their testimony, that they heard about the Machinists' working unit from you, that you were the one who spread the word on that? A. Yes. [207]

Q. Were you designated by Mr. Stadnisky to do that for the union? You were to organize the meeting at Del's Cafe?

A. I was to pass out cards and let it be known that there was a meeting, yes.

Q. And that was under Mr. Stadnisky's direction?

A. It was our own idea. We wanted him to be there so that we could discuss what terms we would have, I mean with that union, that particular union.

Q. Yes, with that union. You were trying to find out what sort of a deal you would get from each of the two unions, is that right?

A. No. I already knew what kind of deal I was going to get from Plastics.

Q. So now you wanted to find out what kind you were going to get from the Machinists?

A. No. I wanted it explained by the union representative to the people.

Q. I see. And at the meeting, only people whom you invited were there, weren't they?

A. No; there was a couple of strangers there, even.

Q. Who were they; or rather, did you learn who they were?

A. Well, one of them was a friend of my son's, Joe

(Testimony of Mary Hedstrom.)

Mallott, and Marlene Vieira's fiance was over there at the meeting. [208]

* * * * *

Q. And this meeting occurred in the back room of Del's Cafe? A. Yes, sir.

Q. And you and Sharon Chisholm were elected as shop stewards? A. Yes, sir.

Q. Was this election in the manner which we have been told; somebody said, "We want Mary," and everybody said, "Yes"? [209]

A. Well, yes; they needed—they said they wanted somebody to represent them, so they chose us. They did.

Q. And then everybody went home except just a few people, is that right? A. Yes.

Q. And who remained there after the bulk of the people went home?

A. Sharon and I, her mother, Marlene, Marlene's fiance, Joe—Joe Mallott.

Q. Marlene's fiance, Joe Mallott? A. Yes.

Q. Is that Joe Mallott of Castro Valley?

A. Yes, I believe so.

Q. Carl Mallott's son?

A. I don't know his father.

Q. A young boy about 23 or 24? A. Yes.

Q. Then, they weren't workers in the plant?

A. No. They just happened to be there. You asked me who was there.

Q. So just the four workers then were there, Opal, Marlene and you and Sharon?

A. Then also the two union representatives were there.

(Testimony of Mary Hedstrom.)

Q. The two union representatives, yes.

A. So far as I know. [210]

Q. Then the two of you appointed the other two who were there as your assistant shop stewards?

A. Yes, we asked them to help us because we didn't have enough time to get around to everybody. [211]

* * * * *

Q. Your contention is that that record is wrong in at least two instances, isn't it? A. Yes, it is.

Trial Examiner: Let the record show that is referring to General Counsel's Exhibit No. 5.

Q. (By Mr. Rhodes): At least in two instances you are positive that that record is wrong insofar as it refers to you, Mrs. Hedtrom? A. Yes.

Q. Is it your contention or was it your thinking that you were the highest producer in the plant?

A. No, sir.

Q. Were you one of the highest producers?

A. I was up there with them. I wasn't the highest. I believe that at the time Sharon was the highest.

Q. That was your opinion, is that right?

A. That is my opinion. I think I was a close runner-up— [219]

* * * * *

Q. What sort of compliments were these from the floorlady concerning your work?

A. She said I did very good work.

Q. Is there any degree of work in the putting of this thing together, is there a matter of putting it—it either works or it doesn't work, doesn't it?

A. Yes.

(Testimony of Mary Hedstrom.)

Q. Is there any degree of skill in putting it together which would cause one worker to put it together better than another, other than the number you turn out?

A. Well, I don't know. I never had time to watch the others, how they put theirs together. I only know how I put mine together. I only know about my own; I never watched the others [226]

* * * * *

NORMA EMERY

a witness called by and on behalf of the General Counsel being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. When did you commence working for the company? A. July 3rd of 1957.

Q. Where did you commence working?

A. I started at San Mateo.

Q. Shortly thereafter the operations moved, they were moved to Castro Valley? A. Yes.

Q. What was your job with the company?

A. I trained the new help as it came in. I worked on the assembly line. Later I was in charge of quality control. I was floor lady also. [233]

Q. As floorlady, were you advised that you had the power to discharge personnel?

A. In the beginning I was told that, yes.

Q. By whom?

A. Mrs. Remer. That was in the very beginning.

Q. When you commenced working for the company what was your rate of pay?

(Testimony of Norma Emery.)

A. Actually my pay was not discussed with Mrs. Remer at all. I was told by Mrs. Stewart that my pay would be $1.00 an hour to start. In other words, for two weeks.

Q. And later?

A. Later I was raised to a dollar and a quarter an hour.

Q. And how about later on after that?

A. Then Mrs. Remer told me, she said, "This hourly rate of pay is not for you," and then she was going to make me a floorlady and start me at $250 a month, if it was satisfactory. And I said it was.

Q. And when was this?

A. I believe that was in the latter part of August—I mean, pardon me, I am sorry—July.

Q. 1957? A. 1957, yes.

Q. And you later received a raise; is that correct?

A. Yes, sir.

Q. When was this? [234]

A. At that time, at the latter part of July, I was raised to $250 a month.

Q. Did you later received a raise?

A. Yes, I did.

Q. When was that?

A. I believe that was in October.

Q. And, as floorlady, were you immediately in charge of the production workers?

A. Not in charge, no. Not completely.

Q. What was your position, then?

A. Well, I was more in charge of quality. My job was to teach the new help as it came in to check on the

(Testimony of Norma Emery.)

work that was done by the girls that were there. I also made spot checks on all, or spot tests, on all shipments that came in.

Q. And you oversaw the work of the girls?

A. Yes, sir.

Q. And at any time did you ever recommend the discharge of any individual? A. Yes, I did.

Q. And who was that?

A. The first one was Adrienne Staack.

Q. And was she discharged?

A. Yes, she was.

Q. Did you recommend the discharge of Sharon Chisholm? A. Yes, I did. [235]

Q. And when was this?

A. Well, I don't recall the exact date. It was the day that Sharon left on a vacation or was to be gone for two weeks.

Q. What month would that be?

A. I think that was in August.

Q. In August?

A. I believe so. I am not positive.

Q. Was she discharged? A. No, sir.

Q. Why did you recommend at that time that she be discharged? A. Because she was impertinent.

Q. You say she was impertinent. Will you explain that, please?

A. Well, I was servicing the table with parts and the trays at that time, along with my other work, and there were always several girls called out at one time on different tables for things. Whichever one I was nearest to was the one I serviced first. And Sharon would get

(Testimony of Norma Emery.)

quite impatient because I wasn't there immediately with whatever she wanted. She would just keep yelling at me and I didn't like it.

Q. And you complained to someone about it?

A. Yes, sir.

Q. Who did you complain to?

A. Well, on that day I told Mr. Remer.

Q. Mr. Remer? [236]

A. Mr. Bill Remer.

Q. You stated that you had trouble with Sharon. Will you relate the full conversation that you two had on this incident?

Mr. Rhodes: In August?

Mr. Jensen: That is correct.

A. As I said, she would keep yelling at me for the things that she wanted.

Q. (By Mr. Jensen): What was it she wanted?

A. Well, either a tray, in some instances, or she would want parts, earphones, or anything that she would need and call for. And on this day she was yelling for a tray, and I told her that I had heard her and for her not to yell at me any more.

Q. What method did they have at that time of getting parts?

A. Well, the girls on the tables would call out whatever thing they needed, and then someone would take it to them. At that time I was doing it.

Q. And that was the only method they had of getting it, was to call out for the parts?

A. That is right.

Q. And that was what Sharon had done at this time?

(Testimony of Norma Emery.)

She had called out for parts? A. Yes.

Q. You state you made a complaint to Mr. Remer, was it, [237] Bill Remer? A. Yes.

Q. And what did you say to Mr. Remer at this time about Sharon?

A. Well, I told Mr. Remer that it was either Sharon or I, one of us had to go.

Q. And what did he say?

A. He said that he would talk to Sharon.

Q. And do you know if he talked to her?

A. Yes, he talked to her.

Q. Did you ever have any further trouble with Sharon? Did you ever have any further trouble with Sharon after that?

A. No, not words, no. No, I didn't have any more trouble with Sharon on sassing me. She didn't. [238]

* * * * *

Q. And in your position you had a chance to observe the work of all the employees? A. Yes, sir.

Q. You observed the work of Mary Hedstrom?

A. Yes.

Q. And as to the quality of her work?

A. Yes.

Q. And the rate of rejects, if any? A. Yes.

Q. What were the results of your observation?

A. She had very, very few, very few due to her own work—I mean by that, assembling them wrong. At the last there, I think at one time we did get a couple of trays of dead ones from Mary, completely, but we later discovered that it was due to earphones, the earphones were bad and not—

Q. Defective earphones?

(Testimony of Norma Emery.)

A. Yes. The work that I took back to Mary, that she had done wrong, was very small.

Q. How many would you say?

A. No more than 6, possibly less.

Q. In what period of time are you speaking of?

A. Well, the full time that she was there. We sort of made a joke about it, because she didn't make mistakes like that. [239]

Q. You mean you made a joke about it when she did have one come back because her work was—

A. Yes.

Q. Would you describe for us the production line at the plant, the process of building one of these radios?

A. Yes, sir. It started with the solderers. They had coils, Alligator clips, earphones and the diodes, and they would solder these parts to the coil. In the very beginning they also cased them. In other words, they put them in the cases as a completed unit. Later we discontinued that type of casing, and then it went from the solderers' table to a testing table and was tested there. Then from there it went to a casing table and was cased, and then it went back to a final test stage.

Q. In this procession, were the rejects following the soldering process turned up in the first testing? Is that correct? A. Yes, that is correct.

Q. And what were the rejects caused by?

A. Well, by several things. It could be that they had been assembled wrong. It could have been that they didn't have enough solder and the things were not making connection. It could have been from faulty parts. It was mostly from faulty parts. [240]

* * * * *

(Testimony of Norma Emery.)

Q. What was the method that the solderers had of obtaining their materials? You testified that they asked for them. Where did they get them from?

A. I got them at shelves, and the testers also picked them up if they weren't busy. And we had come stock-boys that picked them up, too. For the most part, they were kept in shelves in the back, in the plant part. We tried to keep a supply there for the operation of the day.

Q. Were these parts tested for defects or faults before the solderers got them?

A. The crystals on some shipments some of the crystals were tested before they got them. The other parts, especially the ones that came in from Japan, were spot-checked. By that, I mean we would take a certain number of cartons, small boxes, out of a large carton and test for quality. [242]

* * * * *

Q. (By Mr. Jensen): Were you advised of all rejects due to workmanship?

A. I wouldn't say all of them, no. For the most part, yes, sir, because I was on the repair table, and the girls that were working with me on that table would tell me.

Q. And when you got a reject for a defective soldering or defective workmanship, what did you do with it?

A. Then I took it to the girl who had done it and showed it to her and told her what she was doing.

Trial Examiner: What was the practice with respect to the rejects? They went out of the room where you worked, I take it, to some other department after they had been soldered?

The Witness: No, sir. They stayed in the same de-

(Testimony of Norma Emery.)

partment for the testing. It was in the same room.

Trial Examiner: Was that in the same room?

The Witness: Yes, sir.

Trial Examiner: Where did you first learn whether or not a particular job had been rejected?

The Witness: After it left, when it was at the testing table.

Trial Examiner: Was it the practice to inform you? Was that the practice, to inform you if a part had been rejected, if a job had been rejected? [247]

The Witness: Yes, because all the rejects were brought to my table.

Trial Examiner: All of them?

The Witness: Yes, sir. [248]

* * * * *

Q. So that prior to going to repair it hadn't been determined why a unit was rejected?

A. Some of them, it was determined why it had been rejected. Most of them, no.

Q. And you stated that the principal cause of rejects was through faulty parts; is that right?

A. A lot of it was caused through faulty parts, yes, sir.

Q. Did you have—you had occasion to observe the work of Mary Hedstrom? A. Yes, sir.

Q. And you testified that in the time she worked there she probably had about a half a dozen that were soldered wrong; is that right? A. Yes, sir.

Trial Examiner: I still don't understand exactly at what point these rejects came back to you. Will you explain that to me, please?

(Testimony of Norma Emery.)

The Witness: Yes, sir. There was two points that they would come back to me. [250]

Trial Examiner: All right, let's have the whole process.

The Witness: All right. To begin with, they were soldered on one table.

Trial Examiner: Yes, I understand that.

The Witness: From there they went to a testing table and were tested.

Trial Examiner: That is, for quality?

The Witness: That is for quality, yes, sir.

Trial Examiner: All right.

The Witness: If there were any rejects from that first testing table, they were brought back to my table.

Trial Examiner: They were brought back to you then?

The Witness: Yes, sir. If there were no rejects, then they would take them to the casing table. From the casing table they went back to another testing table and were retested again for quality.

Trial Examiner: That is still a quality test?

The Witness: That is still a quality test, yes, sir. and if there were any rejects in that, they were brought to this table.

Trial Examiner: They were brought back to you?

The Witness: Yes, sir.

Trial Examiner: All right. Now, what was the next step in the general process of testing? Was there a further step? You have described two quality testings now. Was there a [251] further step?

The Witness: No. The coils were tested and then

(Testimony of Norma Emery.)

cased, and then after they were cased they were retested for quality, and then, if they were good, why, they were sent out.

Trial Examiner: If they were through, they went on out, then?

The Witness: That is correct. If they were wrong, they were brought back to me.

Trial Examiner: In every instance they were brought back to you?

The Witness: They were brought back to me, back to the repair table, yes, sir.

Trial Examiner: What would you do when they were brought back to you?

The Witness: We would test them.

Trial Examiner: You tested them then?

The Witness: We would find out; if I didn't get anything at all, I would tear it down and test the parts.

Trial Examiner: Was that part of your job?

The Witness: Yes. If there was a faulty part, then I replaced it with a good one and then sent it on out as a completed item.

Trial Examiner: Then, it was your job to determine whether the reject had a faulty part or whether it was faulty workmanship; is that right? [252]

(No response.)

Trial Examiner: Was it your job to determine?

The Witness: Yes, it was my job to determine why they were rejects, yes, sir.

* * * * *

Q. And you determined the cause of any of the rejects that came to you through, which were the work-

(Testimony of Norma Emery.)

manship of Mary Hedstrom? A. That is right.

Q. And what did you say the cause was?

A. The few that I took back to Mary were due to her having soldered them in reverse, wrong.

Q. And you have stated that in the latter part of September there were probably 5 or 6. Is that correct?

A. Well, that was the time, the whole time she worked there, up until the month of September, the whole month of September. [253] I think there was, I know, several trays that were not due to her fault, several trays of rejects that were not due to her fault.

Q. What was the reason for those?

A. We got some bad earphones mixed up with the good ones somehow.

* * * * *

Q. Did you observe the work of Sharon Chisholm?

A. Yes.

Q. And will you describe her work as to quantity and quality?

A. She had a very good production record. I had quite a few rejects from Sharon. I don't know how many, but a number of rejects, due to her fault.

Q. And you say she was a large producer?

A. Yes. For a little while there Sharon was our top producer.

Q. What was your first knowledge of union activity at the plant? When was it?

A. I think around the middle of September. [254]

Q. And can you tell me how you first found out about it?

A. Well, one day—I don't remember the exact date —everybody was in an upheaval, and I was told that

(Testimony of Norma Emery.)

there was some union people around the place, in the back.

Q. And who told you this? A. Mrs. Remer.

Q. Could you tell me as nearly as you can what was said?

A. Well, I won't say that it was on this exact date. I believe so. She asked me had I seen them.

Q. Seen who?

A. Any union representatives. And I told her I had not. And she thought that was strange, that I hadn't seen them. So I told her, "Well, I come early and I am always the last one, I am late going out," and if she would tell me what they looked like, then I would know them when I saw them.

Q. What did Mrs. Remer say?

A. Well, she said, "If you see somebody that's as wide as they are high, with gravy on his tie, crumby, dirty, that's him."

Q. Did you know about a meeting at Del's Cafe on September 24th? A. Yes, I did.

Q. How did you find out about this meeting?

A. I overheard the girls talking about it in the factory.

Q. Did Betty Remer say anything to you about the meeting? [255]

A. No, sir, I don't believe—not at the time I discovered, that I learned about, that they were having the meeting.

Q. Do you know what time the meeting was held?

A. I believe after work, at 4:30.

Q. Did you attend this meeting at Del's Cafe?

A. No, sir, I did not.

(Testimony of Norma Emery.)

Q. Calling your attention to the afternoon of the 24th, approximately 4:30, did you see Betty Remer?

A. I saw Betty Remer after 4:30, I think it was approximately 4:30, yes, sir.

Q. Will you tell me where and the circumstances?

A. She was in the office, she and Mrs. Stewart. [256]

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Q. (By Mr. Jensen): Just tell the whole story of what you saw and overheard.

A. I had started to the front of the office for something, I don't recall what, and I had just got into the doorway. Mrs. Remer and Mrs. Stewart were standing at the window. I didn't—all I heard said was that "There goes two more."

Q. Who said that? A. Mrs. Remer.

Q. Did Mrs. Remer ever say anything to you about a union? A. (No response.)

Q. In the plant?

A. Well, would you tell me a clearer—

Q. Did Mrs. Remer ever discuss union with you?

A. Yes, we discussed it.

Q. When, and what was said?

A. Well, to begin with, Mrs. Remer had told me, did tell me, that, in the shipping department, she made the statement to me one time that if the people wanted a union, why didn't [257] they get a decent one.

Q. And when was this?

A. I don't remember the date. But it was during this period there between September the 15th and the latter part.

* * * * *

(Testimony of Norma Emery.)

Q. (By Mr. Jensen): Did Mrs. Remer ever discuss with you who started a union, who started union activity in the plant?

A. We discussed who, we wondered who started this thing. And Mrs. Remer told me she thought it was Sharon Chisholm and her mother.

Q. Where did she tell you this?

A. In the cafe just down the street, I believe.

Q. Was that the only time that she—?

A. No. Mrs. Remer called me on the telephone one night and told me that she had found out who did start it. And then she told me that Mary Hedstrom had been the instigator of getting this union thing started.

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Q. (By Mr. Jensen): Can you tell us when this happened? [258]

Trial Examiner: Telephone call?

Mr. Jensen: The incident in the cafe.

A. A date?

Q. (By Mr. Jensen): Yes, approximately when this was, when you had this conversation that she said she thought Sharon had brought the union in.

A. Well, it was in this, from the 15th of September until the, I believe, sir, the 1st, between the 15th and we will say, the 20th. I believe, to the best of my knowledge, that's—

Q. And the telephone call incident, was that before or after that? A. No, sir; that was after that.

Q. Do you recall any other conversation with Mrs. Remer at this time of this telephone call?

A. Well, she was telling me that she had found

(Testimony of Norma Emery.)

out that Mary Hedstrom was the instigator of the thing. And I told Mrs. Remer that I couldn't believe that. And she said that Maudine Harbin had told her. And I said, "I still can't believe it's her." She said, asked me, "Do you think Maudine would lie?" And I said, "No, I don't think Maudine would lie." I said, "I think Maudine might have misunderstood." [259]

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Q. When was this, and where?

A. Well, it was Sharon Chisholm. Oh, yes, and this Mrs. Knapp, Opal Knapp. We discussed a lot of people, but these two at this particular time.

Q. When was this?

A. I think that was on our lunchtime.

Q. It would have been after the 24th?

A. Yes, it was after that. I think it was, I seem to remember, or I think it was on the 1st day of October. I won't swear to that, but I believe that is it.

Q. Did Mrs. Remer ever discuss with you discharging Sharon Chisholm? A. Yes, sir.

Q. Where was this and when did the conversation take place and would you recite the conversation?

A. It was in the cafe just down the street.

Q. Who was present?

A. Mrs. Remer and I were there. I think Mr. Remer might have been there. I won't say positively. I won't swear that he was there. He might have been. I think so. And Mrs. Remer wanted to fire Sharon.

Q. Tell me what she said. [260]

A. All right. She said that she wanted to fire Sharon that night and she had to have a legitimate rea-

(Testimony of Norma Emery.)

son for it. She asked me to pick a quarrel with Sharon. And I asked her, I said, "What if Sharon won't quarrel back with me?" And she said, "Well, needle her until she does. I want to fire her tonight."

Q. Was anything else said?

A. Yes, sir. There was—the mother was mentioned, that she was going to be let go.

Q. Opal Knapp?

A. Yes, sir, because of her production. She just wasn't, she just couldn't do the work. And then our conversation went on to general business off the place. I don't recall too much. I was pretty much upset at that time over this whole union thing.

Q. And did you needle Sharon, as requested by Mrs. Remer?

A. No, I didn't. She didn't give me a chance. I didn't, no.

Q. Was this the day that Sharon was discharged?

A. I believe so. To the best of my knowledge, I believe so. It could have been the day before, but I rather think it was that day. I am not sure. [261]

* * * * *

Q. Was the subject of employees forming their own union ever discussed with you? A. Yes, it was.

Q. And who discussed it with you?

A. Well, it had been brought up to me by some of the girls, [264] one of the girls in the shop. To begin with, Mary Preston; and then Mrs. Remer and I discussed it.

Q. And at the time you discussed it with Mrs. Remer, who brought the subject up?

(Testimony of Norma Emery.)

A. I don't know who started the conversation, which one of us. It was probably me. I think me.

Q. And when was this?

A. It was before the election.

Q. And where did the conversation take place? And can you tell me what was said?

A. Yes. It was in the office. Mrs. Remer said that I could take a sheet of paper and type it up on, a heading like "We, the undersigned, would like to form our own union," or some words to that effect—I don't remember the exact words—and then I would take that, I could take that and broach the girls and see how they felt about it, and anybody that wanted to sign, they could, and if they didn't want to sign, it would not be held against them.

Q. At whose suggestion was it that this paper or petition be prepared?

A. Well, Mrs. Remer told me to type these words on here so the girls would know and understand, if they signed, what they were signing for. [265]

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Q. (By Mr. Jensen): Will you tell, then, what was done. Tell us in your own words.

A. Yes. Mrs. Stewart typed it for me, the heading, and I took it back into the plant and I broached several groups of the workers that were standing around and asked them, I told them what I had and that anybody in favor of forming their own union in the plant could do so by signing this paper. I didn't have any luck. I went into the back room, the shipping department, and I asked some of the people back there, told them what I had. And I also told them that they could

(Testimony of Norma Emery.)

sign or not, either way. And this Norman, he just laughed at me, he didn't say anything, he didn't say anything, he just laughed at me. Then I went back into the stock room and presented it to Hank Hartwell.

Hank Hartwell said, "Well"—he swore and said, "Well give it to me. If I don't sign it, I will lose my job, and if I do sign it, I will lose my job." And he said, "What am I going to do?" [266]

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Q. (By Mr. Jensen): You tell us what you did.

A. I took that,—that's what Hank said, and he said, "What can I do?" And I told him I wasn't in a position to advise him either way. He said, "Well, I won't sign it." And I took it and walked off. I went back and I put it on my repair table and told them, anybody that would be interested, and that's where it would be, that they could do it at any time.

Q. Do you know what happened to this petition?

A. No, sir, I don't. I left it on the repair table when I left that night. When I came back the next morning, it was gone.

Q. Can you tell me the date of this incident?

A. No, sir, I cant.

Q. That presented this approximately—was it in September? A. I—

Q. Was it before the— [267] A. Yes, sir.

Mr. Rhodes: What is "yes, sir"?

Trial Examiner: Was it before or after the union meeting across the street?

The Witness: Yes, I believe after, sir. It was after the meeting across the street, I am sure, I think.

(Testimony of Norma Emery.)

Q. (By Mr. Jensen): Did you bring this petition to Marlene Vieira's table?

A. Well, I didn't take it to any table. I took it just to the group of people that were standing around. Marlene was in one of the groups, yes.

Q. Who typed this petition?

A. Mrs. Stewart typed it for me. I asked her to.

Q. And tell me what you told her to put on the petition.

A. I believe I told her to put on there: "We, the undersigned, are in favor of forming our own union within the shop," or some words to that effect. I can't remember the exact words I told her.

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Q. Was there any mention made by anyone about moving the plant?

A. I think there was something, yes, there was something [268] said one time about—

Q. When was this?

A. I don't remember, sir. I just remember that there was something said one time about going to Japan, opening a plant in Japan, or something on that order. I didn't pay too much attention to it; only it was mentioned and, I believe, that Mr. Browner was in Tokyo looking over a site.

Q. When did this take place? Was this a conversation directly? A. At the plant, in the plant.

Q. In the office or in the assembly room?

A. I think it seemed to me like it was in the assembly room.

Q. And who made the statement?

Mrs. Remer made the statement that Mr. Browner

(Testimony of Norma Emery.)

was in Japan looking over a factory. And she also made the statement that they could get their work done cheaper in Japan, because they had to ship the parts in here anyway, and they could assemble cheaper there. [269]

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Cross-Examination [276]

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Q. You never even made any recommendations except in the two cases of recommending the hiring of Adrienne Staack and of Sharon Chisholm?

A. A recommendation for firing?

Q. Yes.

A. Not on the day shift. At the last there was one other person that I wanted to fire.

Q. Who was that?

A. It was one of the colored girls that worked on the night shift. [278]

Q. And her name?

A. It wasn't Geraldine, but something like that.

Q. Did you make any recommendation to Mrs. Remer in this regard?

A. I think that I had told Mrs. Remer that there were two of them that had given me trouble.

Q. And what did you mean by that, that they had given you trouble?

A. Well, they gave me a lot of trouble by their actions, the way that they talked to me.

Q. Do I understand that you recommended that Sharon Chisholm be discharged merely because she called to you for trays?

(Testimony of Norma Emery.)

A. No, sir. Because she was impertinent to me.

Q. When you were being examined by Mr. Jensen, he said: "Is that the only thing she did, ask for trays, like the other girls?" And you said, "Yes," so you recommended she be fired. Which is the case?

A. No, sir. When he asked me that, I told him that she called for trays when she needed things like the other people did.

Q. But there was more than that?

A. But the other girls didn't yell at me like Sharon did.

Q. How would she yell at you?

A. She would keep yelling, "Trays" regardless of what it was. It could have been earphones she wanted instead of [279] giving me time to get to her, she would keep yelling and keep yelling. [280]

* * * * *

Q. Did you ever work at the table with Sharon?

A. No, sir.

Q. I see. Did any of the girls complain to you about it? A. Yes, sir.

Q. How many girls issued complaints to you about Sharon's vulgarity?

* * * * * *

A. The lady that complained to me said that she would like [284] to leave that table because Sharon was using profane and vulgar language, or obscene language I will say.

Q. Back again—

Trial Examiner: Try to get names so we will have this a little more specific.

(Testimony of Norma Emery.)

Q. (By Mr. Rhodes): Was there just one girl who made the complaint to you?

A. One who made the complaint about the obscene and vulgar language.

Q. What was her name? A. Mary Peston.

Q. And did any other girls complaint to you about anything else about Sharon? A. About Sharon?

Q. Yes. A. No.

Q. About Mary Hedstrom?

A. No, sir, I never heard any complaint about Mary Hedstrom.

Q. Did you report this to Mrs. Remer or to Mr. Bill Remer?

A. I believe that I told Mrs. Remer that I had been informed that Sharon was using this language.

Q. Now, concerning your duties in the place, I believe you said, you testified that the girls were under your immediate supervision. What part of their work did you supervise other than checking these instruments to see if the quality was [285] kept up?

A. Well, the new girls that came in, I trained. I checked all their work. I went from table to table checking the quality of their work. If it was done right and if they had been making mistakes, I checked that, and I corrected those mistakes and showed them how to do it. [286]

* * * * *

Q. There were more people let go or dismissed during the time that you were in the plant than just the four people that you have named, were there not?

A. (No response.)

(Testimony of Norma Emery.)

Q. How long were you with the company?

A. Five months.

Q. Were there more than four people that were dismissed during the five months? [287]

A. Oh, yes.

Q. Were you consulted on any of these dismissals?

A. I was told that they were going to be let go, and on some of them I was consulted, yes.

Q. Who were you consulted about?

A. We discussed—well, some of the teenagers, Mrs. Remer and I discussed whether we would keep them and give them a chance or would they ever make it or not.

* * * * *

Q. You knew, then, about all of the rejects that these girls had, all of them, didn't you? Will you answer that? You knew about every reject that every girl had, because they all came through your hands, didn't they?

A. They all came to my table.

Q. Every reject in the place came to your table?

A. So far as I know, they all came to my table. That is where they were supposed—

Q. Would you have any idea how many rejects came to your table in the month of September?

A. I wouldn't have any idea. [288]

Q. Did you handle all of them?

A. With the help of other people, yes, sir.

Q. Oh, there were other people helping, now? How many other people?

A. Well, after school, we had a little boy that came in. And Jim Witkovicz, he would work sometimes on

(Testimony of Norma Emery.)

repairs at night. I had Mary Preston on the repair table for awhile, she was on the repair table for awhile. And at the last, in November, Oma Dufour was there. And Perri Nelson worked sometimes.

Q. So you had—just through September is all we are talking about.

A. Through September? Well, Perri worked on the repair table sometimes. And I don't—

Q. Well, then you had a lot of people working on the repair table all the time, didn't you?

A. No, sir, not all the time.

Q. At various times there were several other people who participated in the repair function?

A. Yes, over a period of time there were several people.

Q. Mrs. Remer was even back on the repair table at times, wasn't she? A. In the beginning, yes.

Q. Then, you are still claiming that every reject that came to that table you had knowledge of? [289]

A. Of course, I had knowledge that they were rejects, or they wouldn't have been on that table. I didn't say that I examined every one of those, myself, Mr. Rhodes.

Q. To know what a reject is caused by, you have got to break the radio down, haven't you?

A. Yes, sir.

Q. And you broke all those radios down yourself, every reject?

A. No, not every one of them. It would be impossible.

Q. Then, other people did this, too?

A. That is right.

(Testimony of Norma Emery.)

Q. And when other people did it, did they leave a memorandum or note to you identifying the radio and why it was rejected?

A. After—you mean the people who were working on the repair table at that time?

Q. I mean anyone who examined a reject, did they report these causes to you, their findings to you?

A. Yes, sir. The testing table would, when the rejects came from the first test over to my table, they would pin little slips of paper on there.

Q. And you got all of them, yourself?

A. Well, if I was the only one on the table that particular day, yes. If there was other people there, they got some of them, too.

Q. Well, when a girl, when the testers tested a radio, it [290] came back to your table marked that it was rejected? A. That is right. Yes.

Q. And you had to tear it apart to find out why, didn't you?

A. Yes, sir, I had to check it to see why.

Q. The testers didn't know why; they just listened through their earphones and said, "This radio is not coming in right," and it was put in a reject stack?

A. That is right.

Q. So you took every one of these instruments and tore it down to find out what was wrong with it?

Mr. Jensen: I think she has said—

A. No, sir, I didn't take every one of them—I took the ones that somebody else wasn't working on.

Q. (By Mr. Rhodes): What percentage of them did you do and what percentage did somebody else do?

(Testimony of Norma Emery.)

A. That would be hard to say, because I had many other duties that I kept up as well as repairs.

Q. Am I right, then, in thinking now that you didn't know what the defects were in all these radios?

A. I know that if they came to the repair table they were rejects, for one reason or another they were rejects.

Trial Examiner: The question is: "Would you know why each one was a reject?"

The Witness: No, sir. If Mary Preston was working on one she didn't tell me what was wrong with it. Only the ones [291] that I worked on.

Q. (By Mr. Rhodes): Well, then, would you please tell me, Mrs. Emery, how in the world you knew that Mary Hedstrom only had 5 or 6 rejects in the whole time that she worked there, for causes which were not due to parts?

A. Because, just like I have already stated, they were so few that we made a joke, that Mary Hedstrom would wire one backwards. It was a joke. And, as far as Mary Hedstrom's other rejects, the other rejects that Mary Hedstrom had, Mary Preston told me, or mentioned the fact at this particular time that she had gotten two trays of rejects, and every one of them was caused from faulty parts. Where there was a lot of rejects, whoever worked on the table reported it to me, if they were from any one individual.

Q. Do you know approximately how many rejects there were each day that came to your table?

A. No, sir; I don't have any record of that.

Q. You didn't keep any record?

A. No, sir. Mr. Remer kept the records.

(Testimony of Norma Emery.)

Q. Oh, Mr. Remer kept the records? Mr. Remer did keep a record? A. Yes, sir.

Q. How many rejected radios could you take apart and discover the error on them and put back together in one day?

A. I really don't know. I never have kept track of it. [292]

Trial Examiner: Did you put them back together?

The Witness: Yes, sir.

Trial Examiner: That was a part of your job?

The Witness: Yes, sir.

Q. (By Mr. Rhodes): You were in charge of this whole table and you don't know how many you could do or how long it takes to do one?

A. How long it would take to do one would depend upon what was wrong with it. Some of those things you have to tear down and run yourself crazy trying to find out what is wrong with it.

Q. Some of them it takes maybe as long as 15 or 20 minutes on one radio, doesn't it?

A. Yes, some of them it takes more than that, and sometimes with some of them it's a matter of two or three minutes to find out what is wrong with them.

Q. I see. Could you do two or three hundred rejects in one day?

A. I am under oath, and I am not going to swear to that.

Q. You are under oath?

A. I don't know how many I could do. I don't know, as I didn't count them. I was too busy.

Q. Would you say that it was impossible that Mary

(Testimony of Norma Emery.)

Hedstrom had 380 rejects during the month of September alone?

A. I don't recall any amount like that coming through that [293] table ever. I just don't have any knowledge of any amounts like that on one person.

Q. Well, do you know who had the lowest record for rejects in the whole plant?

A. Well, I think, to my knowledge, of any of those who had rejects at all, Mary Hedstrom had the lowest record.

Q. That was your impression?

A. I think that she, as I went to her less than anybody else with things that they had done, that she had the least.

Q. You went to her less, you testified that many times—

Mr. Jensen: For my information, are you testifying to rejects for all causes?

Mr. Rhodes: All causes.

Mr. Jensen: All parts, defective earphones?

Q. (By Mr. Rhodes): Maybe we had better clear up the parts. Did you ever bring Mary Hedstrom worse parts then you brought to anyone else? A. No, sir.

Q. When the boys brought the parts to Mary Hedstrom, she got the same kind of parts that anybody else got, didn't she? A. Yes.

Q. There wouldn't be any reason for her to have a higher rate of rejects on parts than anybody else, then, would there? A. It could have happened one time.

Q. One day? [294] A. Yes, sir.

Q. But only at the best, on one day?

A. Yes, sir. As far as I know.

(Testimony of Norma Emery.)

Q. All right. Now, would you know whether or not the very best reject record in the plant was 253 for one month, the very best record?

A. I didn't know anything about the record on the rejects, sir. I was not told. All that I knew about was the things that was posted on the bulletin board, and that was how many they had assembled in a day.

Q. You have mentioned Pauline Lee having a good, high rate of rejects. Do you know whether or not she had a whole 100 rejects less than Mary Hedstrom during September?

A. I wouldn't know about the rejects from Pauline.

Q. You took a whole lot more back to Pauline than you did to Mary, didn't you? A. Yes, sir, I did.

Q. You weren't prejudiced at all toward Pauline, were you?

A. No, I wasn't prejudiced toward Pauline, never.

Q. Was Pauline one of the night shift people that you weren't going to work with any longer?

A. No, sir. Pauline was on the day shift. And I liked her very much.

Q. But it was your impression that she had a lot higher rate of rejects than Mary Hedstrom? [295]

A. Yes, she did.

Q. In your opinion? A. In my opinion.

Q. But you kept no record?

A. No, sir. Mr. Remer kept the record.

Q. Have you ever talked to Mr. Remer about this function of how many rejects there were from the various girls?

A. I think I had mentioned to Mr. Remer that Pauline had a lot of rejects.

(Testimony of Norma Emery.)

Q. You have never complained about Sharon or Mary Hedstrom having a lot of rejects, though, have you?

A. Every reject that I got from Sharon or Mary or anyone else I took back to them.

Q. Who had the greater number of rejects, Mary or Sharon Chisholm? A. Sharon did.

Q. You would say, then, that it was not possible during September that Mary had 80 more rejects than Sharon did? A. I wouldn't know about that.

Q. All right. And you really didn't know about the rejects at all as far as the number each person had, did you?

A. Only the ones that I handled myself; no, sir. I have no record of that.

Q. If you only carried back 5 or 6 to Mary during a period of several months, then I suppose she was only making one or [296] two mistakes a month, according to your memory?

A. Well, Mary wasn't there too long, and she did not make mistakes in assembling.

Q. Then, if she had 381 rejects a month, about 380 of them were the result of bad parts, is that your idea?

A. I know that I didn't take more than—no more than 6, possibly less, back to her and correct her on her work.

Q. Would you have any idea about what percentage of defective parts there were received in this plant?

A. Only by what I heard Mr. Browner and Mrs. Remer say. I think that one time there was a discussion about was it one or two per cent of so many thousands.

Q. One or two per cent?

(Testimony of Norma Emery.)

A. I think that is the way they figured it.

Q. And you know that the defective parts were put in separate cases and counted and shipped back to the manufacturer for refunds, don't you?

A. I know they were put in separate cases. I don't know if they were shipped back for refunds. I know there was an adjustment made.

Q. You heard them talking about defective parts in the amount of one or two per cent?

A. On an over-all, yes, sir.

Q. Then, Mrs. Emery, do you have any way of accounting for the fact that you claim that nearly all of the rejects that [297] Mary Hedstrom had were because of defective parts?

A. I say, a lot of them was, yes, sir. I said that I only took 6 or less, I had only found 6 or less radios assembled by Mary Hedstrom, wrong.

Q. And that's just all you can say about it, isn't it. that's all that you found?

A. That is all I found, yes, sir.

Q. You didn't hear them discussing or you don't know about the rate of defective parts as broken down into sections like what was the percentage of defective parts in coils, clips and so forth, do you?

A. No, sir, I don't. When the plant first opened, I mean in the first month of our operation, that was the time that Mr. Browner and Mrs. Remer were discussing this per cent of parts.

Q. Did you ever hear them say that as the time went on, up into September, they had improved the rejection rate down to about a half of one per cent on parts? A. I didn't.

(Testimony of Norma Emery.)

Mr. Jensen: This is hearsay, about did she hear so-and-so say one per cent.

Trial Examiner: You may answer. Did you hear it? Did you hear that said?

The Witness: No, sir. I answered that. I didn't hear it. [298]

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Q. (By Mr. Rhodes): Did you get as many as 180 rejects in a day, as an average, to your table?

A. Well, yes, sir.

Q. Some days you would get considerably more than that?

A. Some days we would get more than that, yes, sir.

Q. And out of, let's suppose that you got 180, assuming that that would be an average day, about how many of those would you ordinarily take back to the girls who had done the work?

A. Well, I can't answer that correctly because I don't know how many. I didn't count every radio that I took back to the girls.

Trial Examiner: Would you give us a general idea?

The Witness: Just every time that I found one that was soldered wrong, I took it back.

Q. (By Mr. Rhodes): Out of 180, how many a day would you return to the girls?

A. I can't answer that. I told you I didn't count them.

Q. You testified that you didn't take more than 5 or 6 to [300] Mary Hedstrom in the whole time.

A. But that is one person that is so outstanding that

(Testimony of Norma Emery.)

you take so few back to that it's a joke in the whole plant.

Q. I see.

A. But when you are taking back 4 or 5 radios to a tray, on a tray, you are taking them back to everybody, and you can't remember specific numbers to each individual.

Q. You can't remember any numbers except for the fact that Mary was so terrifically outstanding, you sure can remember that?

A. I can remember that I had just such a small amount of rejects on her work.

* * * * *

Q. Did you ever discuss production records with Mr. or Mrs. Remer, production records of various employees? [301] A. Yes, sir.

* * * * *

Q. And then, on the date of the 24th of September, when there was a meeting at Del's Cafe, did you know which union was meeting over there?

A. No, sir, I didn't.

Q. You hadn't signed applications with either union at that time, had you? A. No, sir.

Q. And you didn't later sign an application, did you?

A. No, sir.

Q. You came in the front of the building about 4:30 and you saw Mrs. Remer and Louise Stewart standing by their window? A. Yes, sir.

Q. They were looking over across the street?

A. Yes.

Q. They said, "There goes two more"?

(Testimony of Norma Emery.)

A. Yes, sir. I heard that, "there goes two more."

Q. You heard them say that? A. Yes.

Q. Were you in on the conversation?

A. No, sir, because I was back.

Q. Oh, you were just listening to what they were saying?

A. No, sir, I wasn't listening. I just started, I had just started up to the front, and I had gotten into the doorway, and for some reason, I don't recall why, I turned and went back. [303]

Q. Was that the only remark you heard?

A. That is all I heard, yes, sir.

Q. How do you place that so closely, if you only heard one remark in one conversation, how do you place that conversation as being September the 24th so closely in your testimony?

A. I did hear another remark. I am sorry.

Q. Oh?

A. If you will excuse me—I had stepped into the —I was going into the front office, and I had only gotten to that doorway, and I saw Mrs. Stewart and Mrs. Remer standing up there and I heard something about that, "There's two more, " and somebody else said "Well, how dirty can you get?" or something like that "How dirty can you get?" I believe, or "What a dirty trick," something like that. I was interrupted, possibly somebody called to me or something, I don't remember now, but anyway I didn't get on into the office at that particular time, at that particular moment; I turned and went back. [304]

* * * * *

(Testimony of Norma Emery.)

Q. And then at some unknown date you heard Mrs. Remer say, "If they are going to have a union, why don't they get a decent one?" That was about the middle of September, wasn't it?

A. Somewhere in there. [305]

* * * * *

Q. Did Mrs. Remer tell you on the telephone that it was Maudine who told her who the shop stewards were? A. Yes, sir.

* * * * *

Q. So on October the 1st Mrs. Remer was down at the cafe having lunch with you, was she? Were you eating lunch together? [306]

A. Well, we were in the same booth, yes. I don't recall if Mrs. Remer was having lunch or not. I was.

Q. Mrs. Remer said to you that she wanted to fire that Sharon and directed to go needle her — and pick a fight with her; is that right?

A. Yes, sir, that is right.

Q. What did you say to that? What did you tell Mrs. Remer when she asked you to do such a terrible thing? A. I told her I would.

Q. You told her you would?

A. Yes. I told Mrs. Remer, I said, "Well, what if I can't." That is what I said.

Q. Well, then, at this time you considered yourself against the unions, too, did you?

A. Against them?

Q. Yes. A. Well, I don't understand.

Q. Were you going to pick a fight with a girl without any provocation just to please Mrs. Remer?

(Testimony of Norma Emery.)

A. No. I wouldn't, not without some justification, pick a fight with her.

Q. But you were going to provide, you had planned to provide that justification?

A. Mrs. Remer directed me what to do and I said, "What if I can't?" [307]

Q. Yes?

A. And she said, "Well, needle her until she does sass you."

Q. Did she tell you how to needle this girl?

A. No.

Q. I see. A. Not that I recall.

Q. You told her you would? A. Yes.

Q. And what did you do?

A. I told her, "I will try."

Q. O.K. So you went back to the plant then, and what did you have to say to Sharon that afternoon?

A. I didn't say anything to Sharon that afternoon.

Q. Did you do anything physically? Did you bump into her, do anything at all to her to irritate her, needle her?

A. No. The fact of the matter is I had no opportunity or any occasion to be around Sharon.

Q. I see. A. I was busy elsewhere.

Q. So actually you were too busy to needle her and start this— A. I was very busy, yes.

Q. (By Mr. Rhodes): Did you and Mr. Remer ever go over any matters called "Daily Production Records", which were on blue paper, such as you see in my hand, on this color paper?

A. I can't see what's on that paper.

(Testimony of Norma Emery.)

Q. Well, did you go over any blue papers with Daily Production Records on them? I don't want to show you this particular sheet just now.

A. I don't recall the production record being on a blue sheet of paper.

Q. Did you ever sit down at the end of the day or at the beginning of the day or anytime and go over the previous day's daily production record?

A. With Mr. Remer?

Q. Yes. [318]

A. Yes. Mr. Remer has called my attention to the girls who would have a good record. And if they would drop down, way down, I was to check with the girls if there was a reason for it. If they were not feeling well, then that was forgiveable. If they were just slacking off, then they were to—

* * * * *

Redirect-Examination

Q. (By Mr. Jensen): Referring to the times when Mr. Remer discussed the production records with you, were any other employees present?

A. Well, not right with us. There could—

Q. The discussion was between you and Mr. Remer? [321]

A. Yes, that is correct.

Q. Did Mr. Remer tell you to check with the girls on their daily production records, why they were up or down? Is that right? A. Yes.

Q. When was it—

Trial Examiner: May I ask a question or two there? When Mr. Remer had these production talks with you,

(Testimony of Norma Emery.)

would you then go back and check with the girls that had been mentioned?

The Witness: Yes.

Trial Examiner: To find out?

The Witness: Yes.

Trial Examiner: And then would you report to Mr. Remer?

The Witness: Then I would report back to Mr. Remer yes. [322]

* * * * *

Q. Did you vote in the NLRB election that was held at the plant? A. No, sir.

Q. And why not?

A. They wouldn't let me.

Q. Who?

A. Well, the union. And they told me that I was management — in fact, Mrs. Remer told me that I was her assistant and I was under management and I wouldn't be eligible. [324]

* * * * *

Trial Examiner: Do you know about how many employees were there in the plant?

The Witness: Approximately 30. I believe about that, to the best of my knowledge. [325]

* * * * *

Q. (By Mr. Jensen): You were the only floorlady at the company in September of 1957?

A. That is right.

Q. In October you were on the day shift, and then you were floorlady? A. Yes. [326]

* * * * *

CHARLES BRUNO

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows: [344]

Direct Examination

* * * * *

Q. And on or about the first week in September 1957 did you and some of your agents engage in an organizational effort at the Hearever Co. in Castro Valley? A. Yes, we did.

Q. In the course of that organization did you pass out literature?

A. Yes, we did.

Q. Did you talk to various employees of the company? A. Yes, we did.

Q. Did you hand out applications for membership?

A. Yes.

Q. And how long did your organizational effort last there?

A. From about the first or second week in September until the election, which was somewhere around the first week in November, I think. [345]

* * * * *

BETTY JAYNE REMER

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination [347]

* * * * *

(Testimony of Betty Jane Remer.)

Q. Hearever Co. is a corporation, is it not?

A. That is right.

Q. You are the president of this company?

A. Yes. [348]

* * * * *

Q. When did the Castro Valley operation begin?

A. Around July, early July, July 2nd, I believe.

Q. And the Hearever organization was set up to manufacture what?

A. The Hearever organization was set up to manufacture a premium deal which was sold in—a rather large order was sold to General Mills to go on cereal boxes with coupons.

Q. Do we have one of those with us this morning?

A. I have one, yes.

Q. Would you have one of the novelty radios that was manufactured for this cereal deal?

A. Yes, I do.

Q. Would you pull it from your purse?

A. Here it is (indicating).

Q. I am going to ask you now, as you hold in your hand—I don't know whether or not it should be made an exhibit for the present purpose—will you tell us what this cliplike thing that you have here, that I have in my hand now, is called?

A. Alligator clip.

Q. And in the normal course of operation of this toy radio, what happens to the alligator clip? What is done with it, to [349] operate the radio?

A. You attach it to a conductor of metal so that the radio will play.

(Testimony of Betty Jane Remer.)

Q. Such as a lamp?

A. With the telephone switch, at the end of the line.

Q. And at the other end of the cord appears to be an earphone.

A. Rochelle salt crystal earphone.

Q. And the brownite part is caled the case?

A. Yes.

Q. And the metal operation at the top is the—?

A. Is the rod, tuning rod.

Q. And inside is a coil? A. Coil.

Q. And a diode? A. Crystal diode.

Q. Any other parts inside?

A. Nothing more inside. The spring is another part.

Q. The radio is tuned by operating the plunger, the rod, up and down? A. That is right. [350]

* * * * *

Q. Now, will you describe very briefly, of course, the flow of the manufacturer or assembly of one of these radios? In other words, give us the processes of it.

* * * * *

A. Well, the component parts were at the table of the soldering assemblers. They assembled the alligator clip, the earphone, the diode to the coil, and the coil went to a testing table with a tag.

Q. Did a different person do the testing?

A. Yes. It was tested—

Q. A different person than the assembler?

A. Right. It was tagged and sent over on a tray to the testing table.

(Testimony of Betty Jane Remer.)

Q. And when you say it was tagged, the tray was tagged?

A. The girl put a tag in the tray, giving her number and the date. She put the date herself on the tag. She stamped her number or billed it—I am not clear on that because it was not too important—she dated it and it went to the testing table. The testers tested the— [359]

Q. It went to the testing table without the case on it? A. Right.

Q. And then a tester would do the testing?

A. And the tester would take the tray, test it, put the count on the little tag, and initial it that it was tested, put the amount of rejects on the little tag, and then, strange as it may seem, she put the little tag in a box where it stayed until the end of the night. The coil went on over to another table and was set in a bin or on a tray; we started a tray and we made bins and put them in a bin. There it was cased by a casing assembler. After it was completely cased and cleaned—there were some rough edges that had to be cut off with a knife—it went to a table where I asked them to make what I called "beep" test, which was a test for quality—not for quality in the same sense that the coil was tested, but tested in the sense that it may have been injured in transit, having the case put on, some wire could have been severed. We didn't want any radios to get out in the field that were not in playing condition. We called that a "beep" test.

The girl who made the "beep" test, if she found anything wrong, she, too, had a tag that came from the casing girl on that tray and she noted the condition of

(Testimony of Betty Jane Remer.)

how many there were, if there were any that didn't play, if there was a loose rod, which there sometimes was when they laid it in the plastic, [360] they didn't let the spring lay and fall into the proper slot, she would note those—she wouldn't note them in particular, as the first two weeks we didn't note any particular reason for a defect, that was something that was initiated later—she would note the amount of rejects and she would take her tag and put it in a box, and it stayed there until the end of the day. The rejects were thrown loosely into a bin. They were not segregated as to what girl. They were carried in a pan to the reject table where Mrs. Emery was, and several others, and they were broken down, put in working condition, tested, which was a very lengthy procedure, in my way of thinking, when I am thinking in terms of costs, and put back into stock.

Q. All right. As I understand that, then, this tag indicated the work of an assembler as her tray left the table at the time of the first test, did it?

A. Exactly.

Q. And then after the assembled-with-case item was tested, that second tag was also dropped in a box?

A. Right.

Q. So that no tags went back to the reject table?

A. None whatsoever. They went into a pan. And there was a later date sometime during the month where they tested on a different basis.

Q. Is it your testimony that Mrs. Emery on the reject table [361] got a bin of rejected radios without any identification as to whose radio they were?

A. It most emphatically is.

(Testimony of Betty Jane Remer.)

Q. Was there any way of telling whatsoever who had had rejects other than the yellow tags?

A. Yes. The testers, themselves, occasionally would have a tray with a girl's number on it and they would become alarmed at the majority of her radios being bad, the radios that there might be on that tray. A radio, if they ran through, say, 5 or 6 that didn't play, they were alarmed and they would go to Judy and Judy would go to the girl. [362]

* * * * *

Q. Did you observe the work of Sharon Chisholm while she was there with you? A. Yes, I did.

Q. And was she a good worker?

A. Her work was excellent.

Q. She was one of the fastest workers you had, I understand? A. She was.

Q. And there was nothing excessive about her rate of rejects, was there?

A. Not that ever came to my attention. It was par for the course.

Q. Then, while Sharon Chisholm was working there with you, did you receive any complaints from any of the employees about Sharon?

A. I believe — I don't know whether it was the first or second complaint that came in when Judy was so distraught, the day that she said to me something must be done about Sharon, she said, "Something must be done about Sharon. It's [363] either Sharon or me," or words to that effect. And Sharon had been sassy to Judy. I called it to Bill's attention. I believe Bill said he would talk to her.

(Testimony of Betty Jane Remer.)

Q. Did you have any complaints about Sharon telling dirty jokes or that type of thing? A. I had a—

Mr. Magor: Just a moment. May we have these questions without leading?

Trial Examiner: Let her tell about the nature of the complaint she had.

A. I had two complaints. To the best of my knowledge, Perri and Barbara mentioned them to me. It's vague in my mind. At the time I was quite upset. They implied that there was something there in her conversation that was objectionable. [364]

* * * * *

Q. On the date of October the 21st, did any unusual incident occur between you and Sharon Chisholm?

A. Well, there was a tremendous air of defiance in the factory that day. I know that it was reported to me by Louise that they had left, several of the girls, including Sharon, two of the girls actually, had left early for lunch. So I mentioned it to Bill. And I noticed that Sharon was at her mother's table, which she knew, at working hours, she wasn't supposed to do. That just wasn't done at all. And then at 2:00 o'clock, 2:30, some where in there, I walked by her table and Sharon was sitting there doing nothing, with a cigarette in her hand. I said to Sharon, "Don't you have anything to do?" As I recall, Sharon looked at me and, as she looked at me, [367] she exhaled smoke and said, "Not particularly." And I said, "Well, I think you had better get back to work," which Sharon did.

Q. And at the end of that day you directed Mr. Remer to let her go? A. I certainly did.

(Testimony of Betty Jane Remer.)

Q. Who directed the release of Mary Hedstrom?

A. I did.

Q. And what was the reason for your directing her release? A. Excessive rejects.

Q. Well, did you keep production records in the plant? A. We did.

Q. And copies of those production records have been furnished to the field examiners and to the attorneys for the Board, have they not? A. That is right.

Q. Did you keep any record of rejects of the employees?

A. We had a record, but I was never brought up to date.

Q. And when was the reject record finally tabulated up to date? A. The latter part of September.

Q. And who tabulated it?

A. Bill Remer, with the assistance of someone in the production room.

Q. Did you consult the production records and the reject [368] records before you let Mary Hedstrom go?

A. I did.

Q. What did you find on those records as to Mary Hedstrom's rejects as compared to those of other employees?

A. They were excessive.

Q. Did she have the greatest number of rejects in the plant? A. She did. [369]

* * * * *

Q. (By Mr. Rhodes): Mrs. Remer, when did you first learn about union activity at the Hearever Co.?

A. The first I learned is when I went out into the back lot.

(Testimony of Betty Jane Remer.)

Q. Parking lot?

A. To the parking lot, to get in my car, and was handed a pamphlet.

Q. One of the organizers handed you a pamphlet as you got in your car? A. That is right.

Q. Did you know at that time what union this man represented? A. It was on the pamphlet.

Q. And this pamphlet said what?

A. Leather & Plastic & Novelty Workers.

Q. Do you know about when this was?

A. (No response.)

Q. Early part of Septmeber? [372]

Mr. Rhodes: I am going to show you the original of a notice typed in here on company stationery, and I ask you if that is the notice you posted on your bulletin board on September 25th.

A. That's the notice that I remember.

Mr. Rhodes: I am going to ask to introduce this as Respondent's next in line. I have the original and one [376] thermofac copy, and then I have furnished General Counsel with a thermofax copy of this.

Trial Examiner: Respondent's Exhibit No. 1.

(Thereupon, the document above referred to was marked Respondent's Exhibit No. 1 for identification.)

Trial Examiner: Is there any objection to the receipt of this exhibit?

Mr. Jensen: No objection.

Trial Examiner: Received.

(The document heretofore marked Respondent's

(Testimony of Betty Jane Remer.)

Exhibit No. 1 for identification was received in evidence.) [377]

* * * * *

Q. Now, you have testified that you gave one 10¢ raise in the latter part of August, and apparently you gave another one, from records that have been introduced about September the 23rd, and then another one was posted on September the 30th. Now, Mrs. Remer, was there any reason why these two raises of September 23rd and 30th were given so closely together?

A. The reason was very definitely because of the premium deal having been a marginal type of thing, it was impossible to have done anything in adjusting wages during the duration of that run. However, it was anticipated by the company that as soon as the model change, we had a retail level to work on, a better margin to work on, that we were going to raise the wages to a level that we thought was equitable at that time. However, not having had our financial statement completed and presented to us, we didn't quite know how far [380] we could go in that matter. So we gave our first raise, we intended it for this early part of September. Also the classification was intended at that time and it was roughed in by Mr. Remer and, I believe, discussed with you. And at the time that I took ill and became sick and went to the hospital—

Q. This was about the 14th of September?

A. In there.—I took the papers with me and I studied them there, I had them in my briefcase with me there and as soon as I got back we made the first raise, negligible raise. It was actually unfortunate that they hadn't come sooner, due to this illness, and chaos that it caused.

(Testimony of Betty Jane Remer.)

Q. And then when did you get your first financial statement, which took you up through August 31st?

A. Well, it came in the week after I came back from the hospital; after the raise was established, then some days later our accountant presented the financial statement. It actually was better than I had anticipated under the circumstances, and I would like to show that, and I have seen it before.

Q. And then you made the second round of wage increases? A. Yes, I did.

Q. And that's the one that you posted on September the 30th, right after you got your financial report?

A. That is right. [381]

* * * * *

Q. Have you made any study in the plant as to what percentage of the parts which you received from your manufacturers are rejects? [383]

A. We have; to the best of our knowledge, we have made every attempt to really get this down to a degree that we could work with. It's very difficult with any fluctuation from time to time. But the figure that's come up pretty consistently is a 2 per cent over-all reject, taking all things into consideration.

Q. All parts?

A. And all parts. [384]

* * * * *

Cross-Examination

* * * * *

Q. Did you also pay for an operation for Perri Nelson? A. I certainly did.

Q. What was the cost of that operation?

(Testimony of Betty Jane Remer.)

A. Very negligible. The physician who did the operation was extremely interested in our company policy and he made the—the charge was around 350, which I think was extremely inexpensive.

Q. Was that taken out of Perri Nelson's wages?

A. No, it wasn't.

Q. That was paid for by yourself?

A. Paid for by Hearever Co., Inc., with full permission of the board of directors.

Q. Who were?

A. Nancy Cutler, Gene Rhodes, William J. Browner, and myself.

Q. Gene Rhodes is the attorney representing you here? A. Yes.

Trial Examiner: You said "350." Would you spell that out a little more?

The Witness: $350.

Q. (By Mr. Magor): If I follow your testimony, your first learned about union organization at your plant sometime in [388] September of 1957?

A. That is correct.

Q. And who was it, now, that you first saw out there?

A. You want me to answer that question again?

Q. Who was it you first saw out there?

A. There was a man out there, two men.

Q. Did you know the men?

A. I never seen them before in my life.

Q. When did you first learn their names?

A. I couldn't tell you that.

Q. They are the same gentlemen who have been brought in here as your witnesses today?

(Testimony of Betty Jane Remer.)

A. I only was aware that one man was here.

Q. Which man is that? A. Bruno.

Q. Mr. Bruno. He is with the Leather & Plastic Workers? A. That is correct.

Q. Did you have any conversation with him when you saw him out there at your plant?

A. I said to him, "I prefer you not to hand these pamphlets out on our property." And he said, "All right. we want to cooperate." And I said, "We want to cooperate, too." That was it. [389]

* * * * *

Q. Weren't you concerned when you found the two labor unions were attempting to organize your employees? A. Concerned in what way?

Q. About what they may be asking for wages. [401]

A. I think we all have a fear of the unknown. But I don't know that I was completely concerned over the aspect of wages. [402]

* * * * *

Q. (By Mr. Magor): You say you consulted the reject record of Mary Hedstrom before you let her go. Is that right? A. That is what I said.

Q. That is what you said? A. Yes.

Q. When did you consult her reject record?

A. The day before or the day that she was let go. That is when Mr. Remer brought them to my office and we went over the production records and had a meeting.

Q. That is the first time you consulted them, was the day before or the day you let her go; is that correct?

A. Yes. There had been some delay in getting

(Testimony of Betty Jane Remer.)

them finished, and I told him, I cautioned him about it, and on several occasions I asked him to take care of the matter, to get our things brought up to date.

Q. That is the first time you checked them, was the day before or the day she was let go?

A. The total.

Q. The total? A. The total of anybody's. [403]

* * * * *

Q. October 1st, you say, you were going through the plant about 2:30 and Sharon Chisholm was sitting at her table? A. That is right.

Q. Will you tell us again what she was doing?

A. Doing nothing.

Q. And that's all? A. Smoking a cigarette.

Q. Smoking a cigarette?

A. Sitting at her table on a chair, smoking a cigarette.

Q. And she blew smoke in your face?

A. I don't say she blew—I say, as she talked, it seemed that the smoke exhaled in my face. [404]

* * * * *

Q. (By Mr. Magor): In your direct examination you referred to some accountant's report with respect to granting wage increases. A. Some whose report?

Q. Auditor's report.

A. I have a financial statement.

Q. A financial statement? A. Yes. [410]

Mr. Magor: Might I see it, Mr. Rhodes?

Mr. Rhodes: This is the one she was talking about—

The Witness: That doesn't show the excise tax.

(Testimony of Betty Jane Remer.)

Mr. Rhodes: Excuse me just a moment.

Q. (By Mr. Magor): If I recall your testimony, you looked at your counsel when I asked you that question and said, "Yes, I have seen it."

A. The only reason I made that remark was that I wanted him to hand it to me.

Q. He didn't follow through your suggestion, then, did he?

A. It doesn't make any difference. I have seen it before.

Q. Do you know what the rate of that financial statement is?

A. It's from February to August 31st, I believe.

Q. 1957? A. Yes.

Q. When did you get it?

A. Sometime in September, after I came back from the hospital, I believe.

Q. Do you have a clear recollection now of when you got the financial statement?

A. No, I don't have a clear recollection of when I got the financial statement. [411]

* * * * * *

Q. You weren't checking rejects yourself, were you?

A. Was I checking rejects? I worked a great deal at the reject table in the evening, late at night, sometimes on Saturday.

Q. Did you personally check the rejects of Mary Hedstrom?

A. I didn't personally inspect the rejects of any particular girl until they were at one time labeled for a short time, and at that time I was taking care of the

(Testimony of Betty Jane Remer.)

rejects, not disciplining them. I was alone in the plant.

Q. Do you have any clear recollection whether you worked on any of the radios assembled by Mary Hedstrom at any time?

A. I must have worked on them. I don't have a clear recollection of any particular radio or of any particular time.

Q. Were you doing testing, too?

A. I did some testing.

Q. Do you have a clear recollection of whether you tested any of the radios worked on by Mary Hedstrom?

A. Not—I would take radios back and caution the girls about various things. I perhaps talked to her once maybe. It's possible. I have no clear recollection. [412]

* * * * *

PAULINE SIMS

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows: [418]

* * * * *

Cross-Examination

Q. (By Mr. Jensen): Was Sharon Chisholm the only one who talked at the table?

A. No, she wasn't the only one that talked at the table. But she was the only one that talked that bad at the table, as far as I know.

Q. Did you talk at the table? A. Me?

Q. Yes. A. No, I never talked very much.

Q. You never talked at the table?

A. No; I talked, but not very much. Only Shar-

(Testimony of Pauline Sims.)

on would talk to me. And I never could work fast and talk. [421]

Q. As a matter of fact, everyone talked at the table? A. Once in awhile, yes.

Q. Mrs. Sims, did you complain to anyone about Sharon Chisholm?

A. Yes, I did. But I don't remember just who. It was either Mrs. Emery or Mrs. Remer. I don't remember. [422]

* * * * *

LOUISE STEWART,

a witness called by and on behalf of the Respondent, having been previously sworn, was examined and testified further as follows:

Cross-Examination (Continuing)

Q. (By Mr. Jensen): Did at any time you discuss the union meeting with other employees at the plant, specifically Ira Hartwell?

A. I think Ira Hartwell told me if I wanted a list of those that went to the union meeting, that he would give it to me. And I told him we didn't need the list.

Q. What did you say to him? What was your exact reply to Mr. Hartwell?

A. As I remember it, I told him we didn't need the list.

Q. That you didn't need the list. As a matter of fact, didn't you say, "I already know"?

A. I might have. [448]

* * * * *

(Testimony of Louise Stewart.)

The Witness: Not knowing the exact date of that conversation, I don't know.

Q. (By Mr. Jensen): What, to your best recollection, is the date of that meeting?

Mr. Rhodes: You mean conversation? What meeting?

Mr. Jensen: With Ira Hartwell.

Mr. Rhodes: Conversation?

Q. (By Mr. Jensen): Conversation with Ira Hartwell. [449]

A. In the first part of October.

Q. You are acquainted with Felix Goosbey?

A. Yes, sir.

Q. And do you remember him coming to you and talking to you about a union meeting at Del's Cafe?

A. I remember him talking to me, but I don't remember that that particular meeting was mentioned.

Q. What was mentioned?

A. It could have been.

Q. Do you remember what was mentioned?

A. No, I don't think I do right now.

Q. As a matter of fact, didn't he ask you, didn't he offer to tell you who went to the union meeting at Del's Cafe and you said, "I already know"?

A. I could have.

Q. Did you, to your best recollection?

A. I don't remember.

Q. Did you make a statement to a National Labor Relations Board agent? A. I did.

Q. Mrs. Allen? A. I did.

(Testimony of Louise Stewart.)

Q. Would you like to have that statement to refresh your memory?

A. I would be happy to look at it. [450]

Q. Was this the statement that you gave to Mrs. Allen?

A. It appears to be. It has my initials on it.

Q. Are those your initials on page 1?

A. Yes.

Q. Two, three, four, twice on page 5—three times on page 5, page 6, page 7 twice; is this your signature at the bottom? A. It is.

Q. I will refer you to—

Mr. Rhodes: May I take a look at it before she starts testifying from it?

Mr. Jensen: I would like to have it marked for identification first as General Counsel's Exhibit No. 9.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 9 for identification.)

* * * * *

Q. (By Mr. Jensen): I hand you a statement—you have identified your signature on this statement that you gave? A. I have.

Trial Examiner: Is that General Counsel's Exhibit No. 9?

Mr. Jensen: Yes. I would like to offer this in evidence as General Counsel's Exhibit No. 9. [451]

Trial Examiner: Objection.

Mr. Rhodes: None.

(The document heretofore marked General

(Testimony of Louise Stewart.)

Counsel's Exhibit No. 9 for identification was received in evidence.)

Q. (By Mr. Jensen): Mrs. Stewart, I refer you to the paragraph beginning "I did not" and ask you to read beginning with "I recall once."

A. Do you want me to read it aloud?

Q. Would you read it aloud once?

A. "I recall once two different boys, Hartwell and Felix Goosby, offered to tell me who went to the union meeting at Del's Cafe, and I said I already know." Do you want me to continue?

Q. Read the next sentence.

A. "This happened in the shipping department—it was two different times."

Q. All right, did you testify you gave this statement? A. Yes, I did.

Q. To Mrs. Allen. And you read the statement before signing it, is that correct?

A. That is right. [452]

* * * * *

Mr. Rhodes: To save a lot of time, we will stipulate that you can see, you can sit just like we are sitting in this chair in the Hearever front office and look directly across the street into the front window of Del's Cafe, and there are no obstructions to vision unless it is passing cars or something like that. And you could see the entrance to Del's Cafe. We will save a lot of trouble there.

Q. (By Mr. Jensen): As a matter of fact, Mrs. Stewart, Mrs. Remer was present in the office during that meeting?

(Testimony of Louise Stewart.)

A. I don't believe she was there when work was dismissed that evening. I think she came back just shortly afterwards.

Q. Sometime between 4:30 and 5 o'clock Mrs. Remer was in the front office?

A. I know the exact time that she was there. I know she was [454] back before I left the office.

Q. As a matter of fact, you did discuss the meeting that was going on across the street, did you not?

A. I don't remember of any discussion.

Q. Your statement says: "We undoubtedly did discuss this meeting." A. We probably did. [455]

* * * * * *

WILLIAM A. REMER,

a witness called by and on behalf of the Respondent, having been previously sworn, was examined and testified further as follows:

* * * * *

Direct Examination [477]

* * * * *

Q. For the month of September 1957, when did you first tabulate the number of rejects?

A. For the month of September?

Q. Yes.

A. That would be at the end of the month.

Q. The last day of the month?

A. (No response.) [483]

The Reporter: "The last day of the month?"—did you answer that?

The Witness: No, I didn't.

A. I believe it was the last day of the month, yes.

(Testimony of William A. Remer.)

Q. (By Mr. Rhodes): And did you on September 30th, from the yellow slips, tabulate the rejects for the period September 16th to 30th for Mary Hedstrom?

A. Yes.

Mr. Rhodes: This is just an adding machine tape here (indicating).

Mr. Jensen: Are you going to introduce the slips, themselves?

Mr. Rhodes: Not these (indicating), no.

Mr. Jensen: I am talking about the slips, themselves.

Mr. Rhodes: Yes.

Q. (By Mr. Rhodes): I hand you an adding machine tape of paper which says "Hedstrom—16 to 30—Prod. 35.88—Rejects 3.01" and ask you if that is a tabulation of the slips on Mary Hedstrom's production and rejects from September 16th to September 30th, 1957. A. Yes, that is right.

Q. I hand you a slip, "Sharon Chisholm," which shows "Prod. 43.88—Rejects 2.54," September 16th to 30th, and ask you if that is a tabulation of Sharon Chisholm's production slips and rejects for the same period. [484] A. Yes.

Q. I hand you a slip which says "Harbin—Prod. 40.15—Rejects 4.99" and ask you if that is a record of Maudine Harbin's rejects and production for the same period. A. Yes, it is.

Q. And I show you a fourth slip of adding machine tape, "Lee—16 to 30—Production 35.32—Rejects 2.18" and ask you if that is compiled from Pauline Lee's slips of the same date. A. Yes, sir.

(Testimony of William A. Remer.)

Mr. Rhodes: I am going to ask for the introduction of the four adding machine tapes as our next exhibit in line.

Mr. Jensen: I should like to examine them.

Trial Examiner: Mr. Reporter, will that be Respondent's No. 2?

The Reporter: That is right, sir.

Trial Examiner: Mark them A, B, C and D. They ought to be kept together.

(Thereupon, the multi-page documents above referred to were marked Respondent's Exhibits Nos. 2-A, 2-B, 2-C and 2-D for identification.) [485]

* * * * *

Cross-Examination

Q. (By Mr. Jensen): Mr. Remer, the reject slips which have been introduced in evidence by Respondent—you have examined those? A. Yes, I have.

Q. As a matter of fact, Mr. Remer, the reject slips do not show any reason for rejects, do they?

A. No, they do not.

Q. So that the reject slips here include rejects for faulty parts, is that right? A. For all reasons.

Q. For all reasons?

A. For all reasons, yes.

Q. I call your attention to a reject slip here dated 9/16/57. I notice a "104" and a [slant] "113". What does the "113" stand for?

A. During that period we were going through a trial and error period as far as the method, the best

(Testimony of William A. Remer.)

method of handling these slips. The first number, "104", indicates the girl who made the coil. And the second one, separated by a diagonal line, was the girl that cased or put together those particular coils that were assembled by the solderer.

Q. Then, the latter number shows the party who assembled the tray after it had had its initial testing? A. Yes. [490]

Q. Now, showing you this yellow slip again, how many rejects did you say this one shows?

A. That shows two against the person making the coil, the solderer.

Q. Are you sure that isn't a "21"?

A. No, no, it isn't.

Trial Examiner: Could a reject be caused by the person that assembles the material? You have two numbers on there.

The Witness: Yes, it could be. It could be a reject. But then again the diagonal line was used, and the number of rejects on the other side of the diagonal line was to go against the person who made, actually made, the casing of that particular group.

Trial Examiner: That is what I wanted to know.

The Witness: Yes.

Q. (By Mr. Jensen): And I note that all of these don't bear such notations. Is that right?

A. That is correct.

Q. Why not?

A. We changed the method, as I was trying to explain a moment ago, we changed the method of doing it during this particular time.

(Testimony of William A. Remer.)

Q. You changed the method. Yet some of them show that second number on here. And then there will be a space where there are none, and then later on there will be some. Is [491] that right?

A. Yes, that is right.

Trial Examiner: Do you have any explanation for that?

The Witness: Well, if he would be specific, I would be glad to answer it. If he would show me one here, I will explain it to him, anything he wants.

Mr. Jensen: I don't follow what you want. What is it you want?

Trial Examiner: What I want to know is why sometimes two numbers appear and why sometimes only one number appears.

The Witness: May I see the top one?

Mr. Jensen: Surely.

The Witness: In the case of the first one here, there were no rejects, on the second phase of this. The first time across the testing table, the first number refers to it here, "104", and then it went to the casing people and No. 113 put that outside case on. Then it went back to the "beep" test or the final test. If there had been a reject out of this group of 25, the quantity that were rejects would be on this side of the diagonal line over here (indicating).

Trial Examiner: I gather from the General Counsel's interrogation that both of the numbers did not appear on all of these slips. Now, that is what I wanted you to explain, why they appear on some of them but not on all of them.

(Testimony of William A. Remer.)

The Witness: Well, during, on this particular day—[492]

Trial Examiner: These two numbers at the top?

The Witness: Well, I believe he will find that it is quite possible that on the 16th, when this tag was made, that we used this particular system in place of using two tags; we put them both on one. And there was a period of time when we used only one tag, one tag only, we didn't use two tags. So we changed, we just changed methods of computing, is all. That is why some would have this type and some would have just the one with the single number on it.

Trial Examiner: Well, when you changed, though, you changed; you didn't go back again to the old system, is that right?

The Witness: No, not to my knowledge, I don't believe we did.

Q. (By Mr. Jensen): This shows two rejects out of a quantity of 25. Who were those rejects by?

A. Well, as I stated before, those two rejects go against 104.

Q. 104? A. That is right.

Q. And that is distinguished because the slant line follows the number? A. That is right.

Q. I show you a slip dated 9/17 and ask you how many rejects are shown there, by Mrs. Hedstrom. [493]

A. None.

Q. None for Mrs. Hedstrom?

A. None.

Q. That is because the slant line is down and the "4" is to the right? A. Yes.

(Testimony of William A. Remer.)

Q. I note that some do not have slant lines on them. Now, who are those charged against?

A. May I see the tag?

Q. Here.

A. That is a single tag. It goes against 104.

Q. How can you tell it's against 104?

A. Because there is no other number on it.

Q. There is a number "36" on it.

A. That has nothing to do with the—

Q. What does that mean?

A. We didn't have a number 36 is what I am getting at.

Q. What does the number "36" signify?

A. I have no idea. It's just a notation, is all, of some sort. Those are work tags.

Q. And who does this one show rejects by?

A. No. 104.

Q. No. 104, even though the reject number is way over to the right side?

A. Yes. It wouldn't make any difference because there is [494] only one number on the tag. Some of the testers used those little dots to indicate the number of rejects.

Q. Were you the one who issued these assembly tags? A. Yes.

* * * * *

Q. (By Mr. Jensen): As I understand it, the one who tested the tray of radios marked the quantity on the yellow slip; is that correct? A. Yes.

Q. And also their initials? A. Yes.

Q. Wouldn't it be normal for them to write the

(Testimony of William A. Remer.)

number of [495] rejects, if there were any, in the same pencil or pen?

A. Normally, yes, that is correct.

Q. I call your attention to one here dated 9/19 which shows a quantity of 30 in ink, tested by "E. R.", and at sometime or other in a crayon the number "7" is put in for rejects.—

Trial Examiner: Let him see it, please.

Q. (By Mr. Jensen): Here it is (indicating).

Trial Examiner: Do you have an explanation?

Q. (By Mr. Jensen): Can you give an explanation?

A. Well, I can't explain the actions of the individual tester way back on the 19th of September. For all I know, she may have had a pen in one hand and a grease pencil in the other. It's possible. They were using all sorts of things. Again, these were work tags.

Q. I note another slip dated 9/19, whereby the quantity and the amount and the tester's initials are in pen, the number of rejects is written by another instrument. Will you explain that?

A. The same explanation as the one before.

Q. No explanation?

A. That is not what I said.

Q. I note the same with respect to a slip dated 9/20.

Mr. Rhodes: Can we stipulate that this man didn't write these tags and he has no explanation for discrepancies as to whether they are in ink or pencil and that sort of thing? If [496] they want them examined by a handwriting expert or anybody else, we can give them time to do it.

(Testimony of William A. Remer.)

Mr. Jensen: This man has assembled production records from these slips. I am trying to find out—he has drawn some conclusion from them and I would like to find out what it is.

Mr. Rhodes: Will you accept that stipulation that he doesn't know what the discrepancies are between them as far as writing in pen and pencil, rather than taking the whole bunch, one by one?

Mr. Jensen: I prefer to examine.

Q. (By Mr. Jensen): I show you one marked 9/24. How many rejects does that one show?

A. Ten.

Q. Ten rejects? A. Yes.

Q. Are you sure that isn't the slant line with the zero. A. Positive.

Trial Examiner: May I see it?

Mr. Jensen: I would like the Trial Examiner to see this one. I would also like to show him one dated 9/16.

Mr. Rhodes: There is only one number on the tag, Mr. Jensen.

Trial Examiner: If you want to argue about it—[497]

Mr. Jensen: There is only one number on all of these tags in the latter part of September.

Mr. Rhodes: Because they used the two-tag system, one for the case person and one for the coil person.

Trial Examiner: Do you find any slips there where there is only one number, where there is a slant line used?

Mr. Jensen: Yes, I do. Here's the first one.

Trial Examiner: That has two numbers on it.

(Testimony of William A. Remer.)

Mr. Jensen: All right. I think it is questionable whether that is a "1" and a slant line or an "11".

Trial Examiner: Well, these will be in evidence.

Q. (By Mr. Jensen): I show you a slip dated 9/27/57 and ask you how many rejects are shown on that one. A. Three.

Q. Would you tell me what the "11" before the "3" signfies?

A. It's not an "11". It's three pencil marks to indicate three rejects.

Q. Did you prepare— A. No, I did not.

Q. Do you know what it designates?

A. Yes, I do.

Q. I show one to you with a number "5" and two pencil marks before it. What do the two pencil marks signify? A. Well, in this case—

Q. Two rejects? [498]

A. Will you wait until I finish?

Q. Yes.

A. In this particular case the tester apparently started out to, as they were testing, started to mark the two lines on this to indicate that she had, she was starting to count the rejects, and for some reason or other she apparently stopped.

Q. You testified that there is no manner of telling what the rejects were for on these reject slips?

A. I did.

Q. And these tabulations were made in the latter part of September, is that correct?

A. Yes, from the 16th through the 30th. [499]

* * * * *

(Testimony of William A. Remer.)

Q. And now, when did you first find time, then, to make these tabulations?

A. Only when requested by Mrs. Remer to take the time and get her the results. [504]

Q. Then, it wasn't normal procedure?

A. No.

Q. It wasn't normal procedure; this was at the request of Mrs. Remer?

A. Yes, it was. Yes, it was.

* * * * *

Q. When did you get the reject slips for September 30th?

A. Well, the tabulation that was requested by Mrs. Remer would not include the 30th. It couldn't have, because the slips for the 30th wouldn't come off the testing table completely until probably sometime along about 10 o'clock on the 1st, in the morning.

Q. Then as a matter of fact, the tabulations were not [505] prepared on the 30th, isn't that right?

A. The tabulation as you have it in your hand, no. The tabulation from the 16th, but not including the 30th, yes.

Q. You testified that Mrs. Remer asked you for the reject record, asked you to make a tabulation of reject records. Now, when did you make that tabulation?

A. Well, that was the one I was just explaining to you. That tabulation was made on the 30th, but would not include—I mean on or about the 30th, I am not quite positive—but that would not include the 30th. It couldn't. What I am getting at is that those coils marked the 30th couldn't be tabulated on the 30th because they would still be in the process of going through the testing. And again, as I say, they wouldn't be off

(Testimony of William A. Remer.)

the testing table until along about 10 o'clock in the morning on the, in this case, the 1st of October. So the tabulation that I gave to Mrs Remer, therefore, would not include the 30th.

Trial Examiner: Am I to assume from this that the tabulation that is here in evidence is not the tabulation you gave Mrs. Remer?

The Witness: No, no. Just one, just missing one day. This is what was requested by the National Labor Relations Board to bring with us from the 16th to the 30th. They asked for the 1st, but we had no production on the 1st, that is, that we could account for. And those tags there that he has [506] were for the 16th to the, to and including the 30th.

Trial Examiner: Do you have the tabulation that you actually gave to Mrs. Remer?

The Witness: No.

Q. (By Mr. Jensen): What did you do with it?

A. It was probably just on a slip of paper, I imagine. I don't recall now just how I gave her the tape, and I may have—I may have even given her the tape—I ran it off and I may have even given her the tape. I don't know.

Q. You don't know? A. No.

Q. What employees did you check at that time?

A. In order for Mrs. Remer to make a comparison, I took the four top girls.

Q. The four top girls?

A. Yes, productionwise.

Q. You mean assemblers?

A. Yes, four coil people.

Q. And who were they?

(Testimony of William A. Remer.)

A. That would be Maudine Harbin, Pauline Lee, Mary Hesstrom and Sharon Chisholm.

Q. Sharon Chisholm? A. Yes.

Q. Why did you only use those four employees?

A. Well, I figured that they would give a better cross-section [507] of a group of employees so that the comparison could be made.

Q. And, as a matter of fact, you checked no other employees but those four?

A. At that time, that is right.

Mr. Jensen: That is all.

Mr. Rhodes: No further questions. Thank you.

(The articles heretofore marked Respondent's Exhibits Nos. 2-A, 2-B, 2-C and 2-D, respectively, for identification were received in evidence.)

(Witness excused.)

SHARON CHISHOLM,

a witness called by and on behalf of the General Counsel, having been previously sworn, testified further, on rebuttal, as follows: [511]

* * * * *

Direct Examination

* * * * *

Q. (By Mr. Magor): Did you ever have any conversation with [512] Louise Stewart about a paycheck?

A. Yes, I did.

Q. When did that occur? A. When?

Q. Yes.

(Testimony of Sharon Chisholm.)

A. That was about a week—let's see—the first week in September.

Q. 1957? A. Yes.

Q. Was anybody else present when you saw her?

A. No, there wasn't.

Q. Just tell us what happened.

A. I asked Bill Remer when I was going to get my ten-cent raise. He said, "You got it on your last check." So I hadn't caught it. He said, "You go check the stubs with Louise. So I went up to Louise's desk and she was typing, and she stopped her typing, and I said "Bill sent me up for you to check the payroll and see if I got my ten-cent raise on my last check. She said,"O.K. Just a minute." so I waited and she checked it and she said yes. I went, I said, "Thank you," and I went back to my seat.

Q. Did you talk to her in the tone of conversation that you have just used in testifying? A. Yes.

Q. You didn't butt in on any conversation she was having [513] with somebody else in the office?

A. No, I didn't.

Q. There was nobody else present in there?

A. No.

Q. Were you snippy?

A. No, I wasn't.

Trial Examiner: The word is "snippity," or "snippified," Mr. Magor.

Q. (By Mr. Magor): On the last day that you were working, employed by the company, October 1, 1957, you have testified that you saw Betty Remer that day sometime in the afternoon?

A. Yes.

(Testimony of Sharon Chisholm.)

Q. Did you say to Betty in response to a question: "I don't have anything particularly to do," or did you use the words "not in particular"?

A. No, I didn't.

Q. Did you have a cigarette in your hand at the time you talked to her?

A. No, I didn't.

Q. Did you have a cigarette about you?

A. Yes, I did.

Q. Where was it?

A. It was in the ashtray in front of me.

Q. Did you blow smoke about Betty Remer while you talked to her? [514]

A. No, I didn't.

Q. Were you blowing smoke out of your mouth at the time? A. No.

Trial Examiner: Was the cigarette burning?

The Witness: Yes, it was

Q. (By Mr. Magor): Were you forbidden to smoke while you were working for the company?

A. No.

Q. Did you smoke during the time you were employed?

A. Yes.

Q. Were you moved at any time during the time you were employed by the company?

A. Yes.

Q. By that, I mean from one table to another.

A. Yes, I was.

Q. How many times?

A. Once.

Q. When was that?

(Testimony of Sharon Chisholm.)

A. It was about, I would say, a week or two weeks before I was fired.

Q. And from what table were you moved? Tell us what happened.

A. The first table I was put on when I came there, I was soldering the parts together, casing them and sealing them, putting them on trays. From there I was moved to the other table, on which we just soldered the wiring together, we did [515] no casing.

Q. Who moved you?

A. I am not sure, but I think it was Betty—I mean Bill. Bill Remer.

Q. Did he tell you you were being moved?

A. Well, just that they were splitting, that some girls were going to do just casing and some were going to solder wires. [516]

GENERAL COUNSEL'S EXHIBIT 1-M

January 27, 1958

International Association of Machinists,
District Lodge No. 115, AFL-CIO
306 Pacific Building
Oakland 12, California

Re: Hearever Company, Inc.
Case No. 20-CA-1341

Gentlemen:

The above-captioned case charging violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, has been carefully investigated and considered.

It is my intention to issue a complaint covering the allegations of violation of Section 8(a)(1) and (3) with respect to Sharon Chisholm and Mary Hedstrom. It does not appear that there is sufficient evidence of violations of Section 8(a)(1) and (3) with respect to Marlene Vieira and Opal Knapp to warrant further proceedings at this time and I am, therefore, refusing to issue complaint on this aspect of the charge.

Pursuant to the National Labor Relations Board Rules and Regulations (Section 102.19) you may obtain a review of this action by filing a request for such review with the General Counsel of the National Labor Relations Board, Washington 25, D. C., and a copy with me. This request must contain a complete statement setting forth the facts and reasons upon which it is based. The request should be filed within ten (10) days from the date of receipt of this letter, except that the General

Counsel may, upon good cause shown, grant special permission for a longer period within which to file.

Very truly yours,

GERALD A. BROWN
Regional Director

cc: Division of Operations, NLRB, Washington 25, D. C.
Hearever Company, Inc., 6127 Castro Valley Boulevard, Castro Valley, Calif.
Quaresma & Rhodes, P. O. Box 415, Fremont, California

Postoffice Receipt Attached.

Admitted in Evidence, March 25, 1958.

GENERAL COUNSEL'S EXHIBIT 3-A

[Letterhead]

September 23, 1957

Subject: Classification & Production Wage Schedule

To: All Employees

The following wage and classification schedule, for all employees is attached hereto.

Employees will note their classification and initial in space provided. Future wage changes will be confidential unless noted otherwise.

Employees classification and wages will be subject to change as employees move to higher classification.

HEAREVER CO. INC.
B. J. Remer, Pres.

Admitted in Evidence March 25, 1958.

GENERAL COUNSEL'S EXHIBIT 3-B

[Letterhead]

September 23, 1957

Employee Wage Classification & Schedule

Aroz, Evelyn	Assembler B	E.A.
Barron, Mary	Assembler B	M.B.
Cardoza, Georgia	Assembler B	
Chisholm, Sharon	Assembler Adv. C	S.C.
Davidson, Mable	Assembler B	MD
Dufour, Ona	Assembler B	O.D.
Frey, Mable	Assembler B	MF
Harbin, Maudine	Assembler A	
Hartwell, Ira	Shipping C	HH
Hedstrom, Mary	Assembler Adv. C	MH
Hoffman, Virginia	Assembler C	
Kendall, Gerald	Helper B	G.K.
Lee, Pauline	Assembler Adv. C	P.L.
Murphy, Judith	Assembler Adv. C	
Nelson, Perri	Assembler Adv. C	P.M.
Preston, Mary	Assembler Adv. B	M.P.
Beed, Edna	Tester A	
Vieirra, Marlene	Assembler B	N.Y.
Davis, Margaret	Assembler A	M.D.
Rita Hartwell	Helper B	RH

Admitted in Evidence March 25, 1958.

GENERAL COUNSEL'S EXHIBIT 3-C

[Letterhead]

September 27, 1957

Classification & Production Wage Schedule

Assemblers		Testers	
Assembler C	$1.00	Tester C	$1.00
Assembler B	1.10	Tester B	1.10
Assembler A	1.20	Tester A	1.20
Advanced Assemblers		**Advanced Testers**	
Adv. Assemblers C	$1.25	Adv. Tester C	$1.25
Adv. Assemblers B	1.30	Adv. Tester B	1.30
Adv. Assemblers A	1.40	Adv. Tester A	1.40

Leader Woman	
Leaderwoman C	$1.50
Leaderwoman B	1.60
Leaderwoman A	1.70

Shipping & Packaging

Shipping Clerks	
Shipping Clerk C	$1.25
Shipping Clerk B	1.50
Shipping Clerk A	1.75

Helpers	
Helper C	$1.00
Helper B	1.10
Helper A	1.20

Hearever Co. Inc.
B. J. Remer, Pres.

Admitted in Evidence March 25, 1958.

GENERAL COUNSEL'S EXHIBIT 4

[Letterhead]

September 30, 1957

Wage raise schedule. (Effective September 27, 1957)

Mabel Davidson	Assembler A
Mary Hedstrom	Adv. Assembler B
Maudine Harbin	Adv. Assembler C
Oma Dufour	Assembler A
Marlene Vieira	Assembler A
Georgia Cardoza	Assembler A
Mable Frey	Assembler A
Evelyn Aroz	Assembler A
Mary Barron	Advance Assembler C
Billee Hayes	Assembler B
Elizabeth Clark	Assembler B
Opal Knapp	Assembler A
Norman Finley	Helper B
Hyacinth Agness	Assembler B
Martha Hanson	Helper B
Ramona Bryan	Assembler B
Beryl Johnson	Adv. Assembler C
Synthia Hill	Assembler B
Edna Reed	Adv. Tester C

Admitted in Evidence March 25, 1958.

GENERAL COUNSEL'S EXHIBIT 5

PRODUCTION

September 30, 1957

		Coils	Cases
101	Maudine Harbin	359	
102	Hyacenth Agness		161
103	Paulene Lee	361	
104	Mary Hedstrom	205	
105	Opal Knapp		210
107	Mabel Davidson		206
108	Oma Dufour		186
109	Mamie Larson	97	
110	Mary Barron		328
111	Beryl Johnson	342	
113	Mabel Frey		213
114	Sharon Chisholm	414	
115	Margaret Davis	353	
116	Dovine Johnson		123
117	Evelyn Aroz	219	
118	Billie Hayes		222
119	Elizabeth Clark		121
120	Ramona Bryan		204
121	Synthia Hill		196
122	Elenora Young		144
123	Ruth Thomas		109

Total Coils 2350
Cost 5.13

Total Cases 2423
Cost 7.57

Perm Emp 31

Part Time 3

Shipped 4264

Mo to date 30086

PRODUCTION

September 28, 1957

		Coils	Cases
202	Patricial Cabral		173 193
203	Barbara Avera	165	
204	Carolyn Dobrunick		~~153~~ 191
205	Adrienne Staack	401	
207	Karen Wigand	378	
208	Barbara Miranda		~~157~~ 187
209	Donna Stillman		~~185~~ 217
210	Mary Stuart		~~89~~ 111
211	Tamsen Maxwell		~~92~~ 109

Total Coils 944
Cost 6.5

Total Cases .....~~849~~ 999
Cost 10.3

No. Empl. 18

Shipped 0

Mo to date 25822

PRODUCTION

September 27, 1957

	Names	Coils	Cases
101	Maudine Harbin	365	
102	Hyacenth Agness		117
103	Paulene Lee	388	
104	Mary Hedstrom	380	
105	Opal Knapp		169

106	Judith Murphy	394	
107	Mabel Davidson		198
108	Oma Dufour	125	
110	Mary Barron		302
111	Beryl Johnson	127	
113	Mabel Frey		211
114	Sharon Chisholm	458	
115	Margaret Davis	333	
117	Evelyn Aroz		201
118	Billie Hayes		179
119	Elizabeth Clark		133
120	Ramona Bryan		159
121	Synthia Hill		104

Total Coils 2570
Cost 5.5

Total Cases 1773
Cost 8.8

Perm Empl 29

Part Time 2

Shipped 2064

Mo to date 25822

PRODUCTION

September 26, 1957

	Names	Coils	Cases
101	Maudine Harbin	375	
102	Hayacenth Agness		95
103	Paulene Lee	403	
104	Mary Hedstrom	314	
105	Opal Knapp		172
107	Mabel Davidson		
108	Oma Dufour	94	
110	Mary Barron		321
111			
112			
113	Mabel Frey		197
114	Sharon Chisholm	409	
115	Margaret Davis	301	
116	George Cardoza		104
117	Evelyn Aroz		194
118	Billie Hayes		160
119	Elizabeth Clark		149
120	Ramona Bryan		123

Total Coils	1896
Cost	6.65
Total Cases	1515
Cost	9.34
Perm Empl	27
Part Time	4
Shipped	2446
Mo to date	23758

PRODUCTION

September 29, 1957

		Coils	Cases
101	Maudine Harbin	367	
103	Pauline Lee	321	
104	Mary Hedstrom	366	
105	Opal Knapp		146
107	Mabel Davidson		180
108	Oma Dufour		134
109	Marlene Vieira		130
110	Mary Barron		268
113	Mabel Frey		215
114	Sharon Chisholm	402	
115	Margaret Davis	270	
116	Georgia Cardoza		204
117	Evelyn Aroz		191
118	Billie Hayes		130
119	Elizabeth Clark		124

Total Coils	1726
Cost	6.11
Total Cases	1722√
Cost	9.12
Perm Empl	30
Part Time	1
Shipped	937
Mo to Date	21312

PRODUCTION

September 24, 1957

		Coils	Cases
101	Maudine Harbin	408	
103	Pauline Lee	349	
104	Mary Hedstrom	351	
105	Opal Knapp		101
106	Judith Murphy		
107	Mabel Davidson		196
108	Oma Dufour		148
109	Marlene Vieira		159
110	Mary Barron		310
111	Beryl Johnson		
112	Virginia Hoffman		
113	Mabel Frey		220
114	Sharon Chisholm	418	
115	Margaret Davis	166	
116	Georgia Cardoza		212
117	Evelyn Aroz		198

Total Coils	1692
Cost	6.28
Total Cases	1544
Cost	8.66
Perm Empl	24
Part Time	1
Shipped	1881
Mo to Date	20375

PRODUCTION

September 23, 1957

		Coils	Cases
101	Maudine Harbin	381	
103	Pauline Lee	240	69
104	Mary Hedstrom	386	
107	Mabel Davidson		191
108	Ona Dufour		150
109	Marlene Vieira		139
110	Mary Barron		245
113	Mabel Frey		246
114	Sharon Chisholm	447	
115	Margaret Davis		260
116	Georgia Cardoza		238
117	Evelyn Aroz		210

Total Coils	1454
Cost	5.59
Total Cases	1748
Cost	6.83
Perm Empl	21
Part Time	1
Shipped	1902
Mo to date	18564

PRODUCTION

September 21, 1957

		Coils	Cases
120	Barbara Shrum		208
121	Patricia Cabral		194
122	Barbara Avera	343	
124	Adrienne Staack	362	
125	Barbara Bowen		137
126	Karen Wigand	387	
127	Barbara Miranda		145
128	Donna Stillman		149

Total Coils	1092
Cost	4.89
Total Cases	833
Cost	8.36
Sat Employees	15
Shipped	0
Mo to date	16622

PRODUCTION

September 20, 1957

		Coils	Cases
101	Maudine Harbin	353	
102			
103	Pauline Lee	75	154

104	Mary Hedstrom	171	
106	Judith Murphy	319	
107	Mable Davidson		164
108	Ona Dufour		137
109	Marlene Vieira		128
110	Mary Barron		260
113	Mabel Frey		195
114	Sharon Chisholm	383	
115	Margaret Davis		260
116	Georgia Cardoza		218
117	Evelyn Aroz		188

Total Coils	1301
Cost	5.9
Total Cases	1704
Cost	6.10
Perm Empl	21
Part Time	1
Shipped	1359
Mo to Date	16622
Stock on Hand	1200

PRODUCTION

September 19, 1957

		Coils	Cases
#101	Maudine Harbin	407	
102	Mary Preston		135
103	Pauline Lee	3	226
104	Mary Hedstrom	344	
105			
106	Judith Murphy	392	
107	Mabel Davidson		130
108	Oma Dufour		104
109	Marlene Vieira		125
110	Mary Barron		247
111	Perri Nelson	51	
112			
113	Mable Frey		179
114	Sharon Chisholm	363	
115	Margaret Davis		230
116	Georgia Cardoza		225
117	Evelyn Aroz		155

Total Coils	1560
Cost	4.13
Total Cases	1756
Cost	6.10
No. Emp.	23
Shipped	1206
Mo. To Date	15,263
Stock on Hand	1200

PRODUCTION

September 18, 1957

		Coils Soldered	Cases Completed
#101	Maudine Harbin	354	
102	Mary Preston		288
103	Pauline Lee	320	
104	Mary Hedstrom	443	
105	Rita Hartwell	Packaging	
106	Judith Murphy	off	
107	Mabel Davidson		131
108	Ona Dufour		131
109	Marlene Vieira		151
110	Mary Barron		243
111	Perri Nelson	Testing	
112	Virginia Hoffman		48
113	Mabel Frey		167
114	Sharon Chisholm	368	
115	Margaret Davis		195
116	Georgia Cardoza (1st Day)		152

PRODUCTION

September 16 and 17, 1957

	Coils Soldered	Cases Completed
Maudine Harbin	555	91
Mary Preston	106	484

Pauline Lee	493	130	
Mary Hedstrom	492	136	
Judith Murphy	610	75	
Mabel Davidson		100	See Note (1)
Ona Dufour		281	" " (2)
Marlene Vieira		255	" " (3)
Mary Barron		503	" " (4)
Perri Nelson		32	" " (5)
Virginia Hoffman		200	" " (6)
Mable Frey		226	" " (7)
Sharon Chisholm	602	120	
Margaret Davis		304	" " (8)

Note (1) Part Time

" (2) 2nd & 3rd Day

" (3) " " "

" (4) " " "

" (5) Testing

" (6) 2nd & 3rd Day

" (7) 1st & 2nd Day

" (8) 1st & 2nd Day

Admitted in Evidence March 25, 1958.

GENERAL COUNSEL'S EXHIBIT 7-A

Name—Mary H. Hedstrom

Period Ending—8-1

Time Worked—140

Regular—40.00

O. T. Excess—

Total—40.00

Earnings

F.O.A.—.90

S.D.I.—.40

Inc. Tax—2.70

Deductions

Net Pay—36.00

Detach this stub before cashing.

Hearever Co. Inc., Castro Valley, Calif.

Admitted in Evidence March 26, 1958.

GENERAL COUNSEL'S EXHIBIT 7-B

Name—Mary H. Hedstrom

Period Ending—8-8

Time Worked—8

Regular—8.00

O. T. Excess—

Total—8.00

Earnings

Detach this stub before cashing.

F.O.A.—.18
S.D.I.—.08
Inc. Tax— -0-
Deductions
Net Pay—7.74

Hearever Co., Inc., Castro Valley, Calif.
Time Worked—16
Period Ending—9-5
Regular—16.00

Admitted in Evidence March 26, 1958.

GENERAL COUNSEL'S EXHIBIT 7-C

Name—Mary Hedstrom
Period Ending—9-5
Time Worked—16
Regular—16.00
O.T. Excess—
Total—16.00
F.O.A.—.36

Earnings
S.D.I.—.16
Inc. Tax—

Deductions
Net Pay—15.48

Detach this stub before cashing.

Hearever Co., Inc., Castro Valley, Calif.

Admitted in Evidence March 26, 1958.

GENERAL COUNSEL'S EXHIBIT 7-D

Name—Mary Hedstrom
Period Ending—9-12
Time Worked—40
Regular—40.00
O. T. Excess—
Total—40.00

Earnings
Detach this stub before cashing.
F.O.A.—.90
S.D.I.—.40
Inc. Tax—2.70

Deductions
Net Pay—36.00

Hearever Co., Inc., Castro Valley, Calif.

Admitted in Evidence March 26, 1958.

GENERAL COUNSEL'S EXHIBIT 7-E

Name—Mary Hedstrom
Period Ending—9-20
Time Worked—40
Regular—40.00
O. T. Excess
Total—40.00

Earnings
Detach this stub before cashing.

F.O.A.—.90
S.D.I.—.40
Inc. Tax—2.70

Deductions
Net Pay—36.00

Hearever Co., Inc., Castro Valley, Calif.

Admitted in Evidence March 26, 1958.

GENERAL COUNSEL'S EXHIBIT 7-F

Name—Mary Hedstrom
Period Ending—9-26
Time Worked—36
Regular—4.00, 45.00
O.T. Excess
Total—49.00

Earnings
Detach this stud before cashing.
F.O.A.—1.10
S.D.I.—.49
Inc. Tax—4.50

Deductions
Net Pay—42.91

Hearever Co., Inc., Castro Valley, Calif.

Admitted in Evidence March 26, 1958.

RESPONDENT'S EXHIBIT 1

[Letterhead]

Our company has been growing faster than we anticipated so we are now a much larger group than we were two months ago. As we grow we realize that there will probably be efforts made to organize us into a group. Before any thing is done in this connection you should know what your rights are.

1. You have the right to join any union duly organized under the laws. This impowers that union to be your sole representative and in return you pay intiation fees and dues. The management of this company does not discourage this and will in no way interfere with this right if you choose it.

2. You have the right to refuse to join any union whatsoever. Failure to do so will not jeopardize your job.

3. You may form your own organization to secure what is commonly known as union benefits. If you do this you may set your own dues, initiation fees, and represent yourselves. If you do this the management can in no way dominate or control your organization and you can negotiate your wages and conditions with management just the same as if you were any other union.

4. Management only asks that you think this out for yourselves—we do not want to influence your choice in anyway.

Admitted in Evidence March 27, 1958.

[Endorsed] No. 17042. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner vs. Hearever Co., Inc., Respondent. Transcript of Record. Petition for Enforcement of an Order of the National Labor Relations Board.

Filed: September 23, 1960.

/s/ FRANK H. SCHMID,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

HEAREVER CO., INC.,
Respondent.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 et seq., as amended by 73 Stat. 519), hereinafter called the Act, respectfully petitions this Court for the enforcement of its Order against Hearever Co., Inc., its officers, agent, successors and assigns, Case No. 20-CA-1341.

In support of this petition the Board respectfully shows:

(1) Respondent is a California corporation engaged in business in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10(e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on November 25, 1958, duly

stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, its officers, agents, successors and assigns. On the same date, the Board's Decision and Order was serve upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's Counsel.

(3) Pursuant to Section 10(e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusion of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceeding set forth in the transcript and upon the Order made thereupon a decree enforcing in those sections of the Board's said order which relate specifically to the Respondent herein, and requiring Respondent, its officers, agents, successors and assigns, to comply therewith.

/s/ MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

Dated at Washington, D. C. this day of Aug. 9, 1960.

[Endorsed]: Filed Aug. 10, 1960. Frank H. Schmid, Clerk.

[Title of Court of Appeals and Cause.]

ANSWER OF RESPONDENT

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Hearever Co., Inc., (hereinafter called Respondent) by its attorneys answers the Petition for Enforcement herein as follows:

1. Respondent company admits the allegations of fact contained in the Petition exclusive of conclusions of law or fact, but states that the proceedings referred to therein were contrary to the law and not supported by substantial evidence for the reasons more particularly hereinafter set forth.

2. The Order of November 25, 1958, issued in the unfair labor practice proceedings against the Respondent was invalid and unlawful because:

(a) The aforesaid decision and Order is not based on substantial evidence on the record considered as a whole.

3. The Petitioner's actions in the unfair labor practice proceedings and in its Order of November 25, 1958 would not carry out and effectuate the policies of the Act.

Wherefore, Respondent prays that the Petition for En-

forcement herein be denied and that the Petitioner's Order of November 25, 1958, be set aside.

Respectfully submitted,

HEAREVER CO., INC.
By: RHODES & SABRAW
/s/ By FRED AVERA
Attorneys for Respondent
County Building Center
P. O. Box 415
Fremont, California.

Dated: August 29, 1960.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Aug. 31, 1960. Frank H. Schmid, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH PETITIONER INTENDS TO RELY

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, petitioner herein, hereby files this statement of points upon which it intends to rely in the above-entitled proceeding:

I.

Statement of Points

1. Substantial evidence supports the Board's findings that respondent, in violation of Section 3(a)(1) of the Act, threatened to move the situs of its plant, circulated a petition for a company-sponsored union, and granted a wage increase for the purpose of defeating the Union's organizational efforts.

2. Substantial evidence supports the Board's findings that respondent, in violation of Section 8(a)(3) and (1) of the Act, discriminatorily discharged employees Chisholm and Hedstrom.

/s/ MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

Dated at Washington, D. C. this 19th day of September, 1960.

[Endorsed]: Filed Sept. 23, 1960. Frank H. Schmid, Clerk.